

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

STATE OF ALABAMA,

Plaintiff,

-against-

ABBOTT LABORATORIES, INC., et al.,

Defendants.

Civil Action No. 2:06cv00920-MHT

**DEFENDANT DEY, L.P.'S MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO STAY CONSIDERATION OF PLAINTIFF'S
MOTION TO REMAND PENDING TRANSFER TO THE MDL COURT**

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	
THIS COURT SHOULD EXERCISE ITS INHERENT POWER TO STAY CONSIDERATION OF THE REMAND MOTION PENDING THE ACTION'S IMMINENT TRANSFER TO MDL NO. 1456 PENDING IN THE DISTRICT OF MASSACHUSETTS	3
A. A Stay Of The Remand Proceedings Will Promote Judicial Economy.....	5
B. A Stay Of Proceedings Will Avoid Inconsistent Rulings By Different District Courts.....	6
C. Plaintiff Will Not Be Prejudiced If This Court Stays All Proceedings Pending The JPML's Decision On Transfer	8
D. Defendants Will Be Severely Prejudiced If This Court Does Not Stay Proceedings Pending The JPML's Decision On Transfer	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

	Page
<u>Aikins v. Microsoft Corp.</u> , No. Civ.A.00-0242, 2000 WL 310391 (E.D. La. Mar. 24, 2000)	7
<u>Board of Trustees of the Teachers' Retirement System of the State of Illinois v. Worldcom, Inc.</u> , 244 F. Supp. 2d 900 (N.D. Ill. 2002)	5
<u>Bledsoe v. Janssen Pharmaceutica et al.</u> , No. 4:05 CV 02330 (ERW), 2006 U.S. Dist. LEXIS 5524 (E.D. Mo. Feb. 13, 2006)	9
<u>Buie v. Blue Cross & Blue Shield of Kansas City</u> , No. 05-0534-CV-W, 2005 WL 2218461 (W.D. Mo. Sept. 13, 2005)	8
<u>Cline v. Merck & Co.</u> , No. Civ. S-06-487, 2006 WL 1409555 (E.D. Cal. May 19, 2006)	7
<u>County of Erie v. Abbott Labs., Inc.</u> No. 05-CV-6203T (SC) (W.D.N.Y. June. 1, 2005)	fn. 1
<u>Digel v. Abbott Labs., Inc.</u> No. 03-2109 BBD (W.D. Tenn. Mar. 11, 2003)	fn.1
<u>Egon v. Del-Val Finance Corp.</u> , Civ. A. No. 90-4338, 1991 WL 13726 (D.N.J. Feb. 1, 1991)	9
<u>Geller v. Abbot Labs, Inc.</u> No. CV 02-00553 (C.D. Cal. Mar. 21, 2002)	fn. 1
<u>Good v. Prudential Insurance Co. of America</u> , 5 F. Supp. 2d 804 (N.D. Cal. 1998)	9
<u>Grable. & Sons Metal Products, Inc. v. Darue Engineeringg & Manufacturing</u> , 545 U.S. 308, 312 (2005)	2
<u>Hawaii v. Abbott Labs., Inc.</u> , CV No. 06-00437 (DAE-BMK) (D. Haw. Oct. 27, 2006)	2
<u>In re Amino Acid Lysine Antitrust Litigation</u> , 910 F. Supp. 696 (J.P.M.L. 1995)	7
<u>In re Immunex Corp. Average Wholesale Price Litigation</u> , 201 F. Supp. 2d 1378 (J.P.M.L. 2002)	2, 3
<u>In re Ivy</u> , 901 F.2d 7 (2d Cir. 1990)	3, 7, 8

<u>In re Pharm. Ind. Average Wholesale Price Litigation</u> , MDL No. 1456, 2006 WL. 3019193 (D. Mass. Oct. 24, 2006).....	1, 2, 6
<u>In re Rezulin Litig.</u> , No. C03-4494, 2003 WL. 23119748 (N.D. Cal. Nov. 24, 2003)	7
<u>In re Vioxx Prod. Liab. Cases</u> , No. 05cv0943 (DMS (LSP)), 2005 U.S. Dist. LEXIS 40743 (S.D. Cal. July 11, 2005)	4, 6
<u>Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. AstraZeneca PLC</u> , No. 03 CV 03230 (SRC) (D. N.J. Jul. 23, 2003)	fn. 1
<u>Landis v. N. America Co.</u> , 299 U.S. 248 (1936).....	3
<u>Larios v. Perdue</u> , 306 F. Supp. 2d 1190, 1201 (N.D. Ga. 2003).....	3
<u>Mangari v. Merck & Co.</u> , No. 2:06-CV-00914 (KJD-PAL), 2006 U.S. Dist. LEXIS 67155 (D. Nev. Sept. 19, 2006).....	3
<u>Med. Soc'y v. Conn. Gen. Corp.</u> , 187 F. Supp.2d. 89, 92 (S.D.N.Y. 2001).....	7
<u>Meyers v. Bayer AG</u> , 143 F. Supp. 2d 1044 (E.D. Wis. 2001)	3, 7
<u>Michael v. Warner-Lambert Co.</u> , No. 03cv1978 (DMS(RBB)), 2003 U.S. Dist. LEXIS 21525 (S.D. Cal. Nov. 20, 2003)	4, 7
<u>Montana v. Abbott Labs., Inc.</u> , No. CV 02-09-H-DWM (D. Mont. June 21, 2002) ..	4, fn.1
<u>Nevada v. Abbott Labs., Inc.</u> , No. CV-N-02-80-ECR (D. Nev. Jul. 26, 2002)	4, fn.1
<u>Nevada v. American Home Products, Inc.</u> No. CV-N-02-202-ECR (D. Nev. Jul. 26, 2002).....	fn.1
<u>New Mexico State Investment Council v. Alexander</u> , 317 B.R. 440 (D.N.M. 2004).....	9
<u>Quincy Community Svcs. District v. Atlantic Richfield Co.</u> , No. Civ. 5-03-2582 (LKK/DAD), 2004 U.S. Dist. LEXIS 29496 (E.D. Cal. Mar. 25, 2004).....	8
<u>Rice v. Abbott Labs., Inc.</u> , No. C 02-3925 (N.D. Cal. Nov. 26, 2002)	fn.1
<u>Rosenfeld v. Hartford Fire Ins. Co.</u> , Nos. 88 CIV. 2153 (MJL), 88 CIV. 2252 1988 WL. 49065 (S.D.N.Y. May 12, 1988)	9
<u>Swanston v. TAP Pharm. Prods. Inc.</u> , No. 03-CV-62-PHX-SMM (D. Ariz. May 16, 2003)	fn. 1

<u>Tench v. Jackson National Life Insurance Co.</u> , No. 99 C 5182, 1999 WL. 1044923 (N.D. Ill. Nov. 12, 1999).....	9
<u>Turner v. Bausch & Lomb Inc., et al.</u> , No. 8:06-cv-1088, 2006 U.S. Dist. LEXIS 48546 (M.D. Fla. July 17, 2006).....	7
<u>Virag v. Allergan, Inc.</u> No. 02-8417 RSWL (C.D. Cal., Jan. 7, 2003).....	fn. 1
<u>Woods v. Merck & Co., et al.</u> , No. 05-133-T/An, 2005 U.S. Dist. LEXIS 31610 (W.D. Tenn. Nov. 23, 2005).....	5, 7

STATUTES

31 U.S.C. §3732(b)	1
28 U.S.C. § 1407.....	3

PRELIMINARY STATEMENT

On October 11, 2006, Defendant Dey, L.P. (“Dey”) removed this action and removed or supplemented its removal papers in fourteen other nearly identical actions on the grounds that the filing of a suit by the United States triggered a federal statute, 31 U.S.C. §3732(b), that conferred federal jurisdiction on the respective federal courts to adjudicate the state actions. To date, remand motions have been filed by Alabama, Wisconsin, Illinois, Florida, Hawaii, and Mississippi. Unless stays are granted, it is likely that fifteen District Courts will be considering essentially the same motions to remand. All of the motions will involve common, complex factual and legal issues. This will not only create massive inefficiency and duplication of work by the Courts and counsel, but also will pose a substantial risk of conflicting decisions on the same issue. On the other hand, a stay will not cause any prejudice to plaintiff, as only minimal delay in these proceedings is likely and discovery is proceeding under arrangements previously agreed to by counsel

On October 13, 2006, Dey filed “tag along” notices with the Judicial Panel on Multidistrict Litigation (“JPML”) requesting that all the newly removed actions be transferred to Judge Patti Saris of the District of Massachusetts who was appointed in April 2002, by the JPML, to oversee *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (the “AWP Litigation”). The JPML is expected to act in the coming weeks. In appointing Judge Saris, the JPML noted that that “[c]entralization of all actions . . . in the District of Massachusetts will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation...[and] avoid further duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel

and the judiciary.” *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp.2d 1378, 1380 (J.P.M.L. 2002).

As a result of numerous proceedings in her Court, Judge Saris has extensive background on the issues in the AWP Litigation in general and with removal/remand issues in particular. As Judge Saris observed only last week in an order dated October 24, 2006 denying a motion to remand a case filed by the State of Arizona, she is in the best position to uniformly address the important national issues implicated in these cases:

As the judge assigned the massive multi-district litigation, involving class actions and numerous attorney general suits, I conclude that the issue of the meaning of AWP under the federal Medicare statute has national significance. A federal forum provides experience, solicitude and uniformity on this important federal issue.

In re Pharm. Ind. Average Wholesale Price Litig., MDL No. 1456, 2006 WL 3019193, at *4 (D. Mass. Oct. 24, 2006) (*citing Grable. & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005)).

As Judge Saris points out in her October 24 decision, there are already conflicting remand decisions by different courts looking at the same issue in the same type of case. Indeed, last week, Magistrate Judge Kurren in the District of Hawaii and Judge Saris issued directly contrary opinions on the same subject. *Compare In re Pharm. Ind. Average Wholesale Price Litig.*, 2006 WL 3019193, at *4 (attached hereto as Exhibit A) *with State of Hawaii v. Abbott Labs., Inc.*, Amended Finding and Recommendation That Plaintiff's Motion for Remand be Granted, CV No. 06-00437 (DAE-BMK) (D. Haw. Oct. 27, 2006) (annexed hereto as Exhibit B). In the interest of uniformity, not to mention efficiency, Dey requests that this Court stay the remand motion pending the transfer of this action by the JPML to Judge Saris.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS INHERENT POWER TO STAY CONSIDERATION OF THE REMAND MOTION PENDING THE ACTION'S IMMINENT TRANSFER TO MDL NO. 1456 PENDING IN THE DISTRICT OF MASSACHUSETTS

It is axiomatic that “District courts have inherent authority to stay proceedings before them.” *Mangari v. Merck & Co.*, No. 2:06-CV-00914 (KJD-PAL), 2006 U.S. Dist. LEXIS 67155, at *2 (D. Nev. Sept. 19, 2006) (citation omitted). This power is “incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Larios v. Perdue*, 306 F. Supp. 2d 1190, 1201 (N.D. Ga. 2003) (quoting *Landis*). In addition, Congress has granted this Court statutory authority to issue a stay “because 28 U.S.C. § 1407 authorizes the JPML to order a case transferred despite the pendency of a jurisdictional objection.” *Meyers v. Bayer AG*, 143 F. Supp.2d 1044, 1047 (E.D. Wis. 2001) (citing *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990)).

Exercising the power to stay the remand motion pending action by the JPML advances a number of important objectives. The JPML “describes the remedial aim of the MDL statute as an effort to avoid ‘pretrial chaos’ and ‘eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions.’” *Michael v. Warner-Lambert Co.*, No. 03cv1978 (DMS(RBB)), 2003 U.S. Dist. LEXIS 21525, at *8 (S.D. Cal. Nov. 20, 2003) (citation omitted). To further this goal, the MDL for the AWP Litigation was created, among other reasons, to centralize AWP litigation in order to “avoid [] duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary. . .” *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378, 1380 (J.P.M.L. 2002).

The JPML chose to entrust AWP litigation to Judge Saris in the District of Massachusetts because that District “i) already has a broad action pending there, and ii) has the resources available to manage [the] litigation.” *Id.* at 1381. Since the April 2002 Order, the JPML has transferred more than ninety related cases in order to “serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.” *Id.* at 1380; *see, e.g.*, Orders Granting Stays Pending the MDL Panel’s Ruling on Transfer in *The State of Montana v. Abbott Labs., Inc., et al.*, CV 02-09-H-DWM (D. Mont. June 21, 2002) and *The State of Nevada v. Am. Home Prods. Corp., et al.*, Nos. CV-N-02-202-ECR (RAM), CV-N-02-80-ECR (RAM), at 24 (D. Nev. July 26, 2002) (annexed hereto as Exhibits C and D respectively). Recognizing the need for uniform and efficient disposition of the cases, several District Courts in these pricing litigations have issued stays pending the JPML’s decision to transfer to MDL No. 1456.¹

When considering a motion to stay pending a possible transfer to an MDL court, a district court should consider: “(1) potential prejudice to the non-moving party if the action is stayed; (2) hardship and inequity to the moving party if the action is not stayed; (3) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact consolidated; and (4) the potential for conflicting rulings.” *In re Vioxx Prod. Liab. Cases*, No.

¹ *See Geller v. Abbott Labs., Inc.*, No. CV 02-00553-DDP (C.D. Cal. Mar. 21, 2002) (Pregerson, J.) (“The Court finds that all factors, including the jurisdictional issues presented and the potentially expansive nature of this litigation, favor granting the stay”); *Montana v. Abbott Labs., Inc.*, No. CV 02-09-H-DWM (D. Mont. June 21, 2002) (Molloy, J.) (“In this case, the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay.”); *Nevada v. Abbott Labs., Inc.*, No. CV-N-02-80-ECR (D. Nev. Jul. 26, 2002), *as amended*, (Aug. 2, 2002) (Reed, J.) (“*Nevada I*”); *Nevada v. Am. Home Prods., Inc.*, No. CV-N-02-202-ECR (D. Nev. Jul. 26, 2002), *as amended*, (Aug. 2, 2002) (Reed, J.) (“*Nevada II*”) (action identical to Nevada I but involving different defendants); *Rice v. Abbott Labs., Inc.*, No. CV 02-3925-MJJ (N.D. Cal. Nov. 26, 2002) (Jenkins, J.); *Virag v. Allergan, Inc.*, No. 02-8417-RSWL (C.D. Cal. Jan. 7, 2003) (Lew, J.); *Digel v. Abbott Labs., Inc.*, No. 03-2109-BBD (W.D. Tenn. Mar. 11, 2003) (Donald, J.); *Swanston v. TAP Pharm. Prods. Inc.*, No. 03-CV-62-PHX-SMM (D. Ariz. May 16, 2003) (McNamee, J.); *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. AstraZeneca PLC*, No. 03 CV 03230-SRC (D.N.J. July 23, 2003) (Chesler, J.); and *County of Erie v. Abbott Labs., Inc.*, No. 05-CV-6203T-MAT (W.D.N.Y. June 1, 2005) (Telesca, J.).

05cv0943 (DMS, (LSP)), 2005 U.S. Dist. LEXIS 40743, at *3-4 (S.D. Cal. July 11, 2005) (staying action pending transfer to MDL). All of these factors in the current remand situation militate strongly in favor of the limited stay Dey is requesting.

A. A Stay Of The Remand Proceedings Will Promote Judicial Economy

The stay that Dey requests will promote judicial efficiency. Instead of fifteen federal courts around the country receiving fifteen sets of briefs and holding hearings to decide fifteen identical motions under the varying decisions in the various Circuits, a single court, the MDL Court, can hear and decide the motions once. In addressing the motions, Judge Saris will bring to bear extensive background on the legal and factual issues in the cases. Judge Saris has devoted substantial time and resources over the past four years in analyzing numerous and complex jurisdictional, factual, and legal issues that have been raised in these AWP cases and is familiar with the legal and factual intricacies presented by the other AWP cases, including those brought by other States alleging violations of state law.

For any court to develop the background that Judge Saris has obtained over four years would require extensive time and resources. In contrast, as one district court has recognized in granting a motion to stay pending a decision from the JPML on transfer in the interest of judicial economy, “[a]lmost by definition, little or no judicial resources are expended during the pendency of a stay.” *Bd. of Trs. of the Teachers’ Ret. Sys. of the State of Illinois v. Worldcom, Inc.*, 244 F. Supp. 2d 900, 905 (N.D. Ill. 2002).

Courts in other AWP cases have granted stays in the face of a jurisdictional challenge by the plaintiff on a motion to remand. *See supra* p. 4 note 1. In *Woods v. Merck & Co., et al.*, No. 05-133-T/An, 2005 U.S. Dist. LEXIS 31610 (W.D. Tenn. Nov. 23, 2005), the court granted defendant’s motion to stay pending the JPML’s decision on transfer and deferred plaintiff’s motion to remand to the transferee court:

The Court finds that having the jurisdictional issues decided in one proceeding will promote judicial economy and conserve judicial resources. In addition, the Court finds that any prejudice to the plaintiff resulting from a stay would be minimal. However, in the absence of a stay, the risk to [defendant] of duplicative motions and discovery is significant.

2005 U.S. Dist. LEXIS 31610, at *4.

There is simply no question that a stay will conserve judicial resources pending this action's likely imminent transfer to MDL No. 1456 before Judge Saris.

B. A Stay Of Proceedings Will Avoid Inconsistent Rulings By Different District Courts

One of the principal reasons for the MDL process is to avoid inconsistent rulings on the same or similar issues. *In re Vioxx Prod. Liab. Cases*, 2005 U.S. Dist. Lexis 40743, at *6. Indeed, “[i]f different decisions are made by numerous judges, they have no consistency or predictability.” *Id.* (citation omitted).

Without the stay Dey requests, there is a significant chance that the decisions of fifteen courts on the same remand issue will conflict in analysis and/or result. Indeed, there are already remand decisions that directly conflict with each other. For example, as Judge Saris noted in her October 24, 2006 decision, the Eastern District of Pennsylvania granted remand of an AWP case on the grounds that there was no substantial federal question as to the meaning of AWP while Judge Saris denied a similar remand action concluding that “the meaning of AWP under the federal Medicare statute has national significance.” *In re Pharm. Ind. Average Wholesale Price Litig.*, 2006 WL 3019193, at *4. As noted above, Magistrate Kurren in Hawaii issued a report and recommendation agreeing with one federal court on the issue of remand while disagreeing with Judge Saris. *See supra* pp. 2-3. The pre-trial chaos that the MDL process is meant to prevent is now underway with conflicting district court decisions on the same remand

issues in identical cases. There is simply no reason to risk further conflicting decisions on these important issues.

Moreover, in granting the limited stay, this Court will be following the accepted general practice for federal courts to defer ruling on pending motions to remand in MDL litigation until after the JPML has transferred the case to the MDL Panel. *See Turner v. Bausch & Lomb Inc.*, No. 8:06-cv-1088, 2006 U.S. Dist. LEXIS 48546, at *2 (M.D. Fla. July 17, 2006) (granting stay pending decision on MDL transfer); *Warner-Lambert*, 2003 U.S. Dist. LEXIS 21525, at *9-10 (same); *Woods*, 2005 U.S. Dist. LEXIS 31610, at *4 (granting stay pending decision on MDL transfer and observing that “[a]lthough some courts have opted to rule on pending motions to remand prior to the MDL Panel’s decision on transfer, . . . there are many more that have chosen to grant a stay, even if a motion to remand has been filed.”) (citations omitted); *Cline v. Merck & Co.*, No. Civ. S-06-487, 2006 WL 1409555, at *1 (E.D. Cal. May 19, 2006) (same); *In re Rezulin Litig.*, No. C03-4494 (and related cases), 2003 WL 23119748, at *1 (N.D. Cal. Nov. 24, 2003) (same); *Meyers*, 143 F. Supp. 2d at 1046-47 (same); *Med. Soc’y v. Conn. Gen. Corp.*, 187 F. Supp.2d 89, 92 (S.D.N.Y. 2001) (same); *Aikins v. Microsoft Corp.*, No. Civ.A.00-0242, 2000 WL 310391, at *1 (E.D. La. Mar. 24, 2000) (same); *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (recognizing court’s authority to stay action despite pending jurisdictional issues).

Applying that approach in these cases is even more important here where there are so many duplicative, yet identical, remand motions. These remand motions should be presented to and decided by the transferee judge. *See, e.g., In re Amino Acid Lysine Antitrust Litig.*, 910 F. Supp. 696, 700 (J.P.M.L. 1995) (ordering consolidation and transfer and recognizing that “the pending motion to remand . . . can be presented to and decided by the

transferee judge”); *Buie v. Blue Cross & Blue Shield of Kansas City*, No. 05-0534-CV-W, 2005 WL 2218461, at *1-2 (W.D. Mo. Sept. 13, 2005) (granting stay pending a ruling by the JPML and noting that “plaintiffs’ pending remand motion can be presented to and decided by the transferee judge.”) (internal quotation marks omitted).

In *Krieger v. Merck & Co.*, No. 05-CV-6338L, 2005 U.S. Dist. LEXIS 27633 (W.D.N.Y. Nov. 4, 2005), the district court granted defendant’s motion to stay and deferred plaintiff’s remand motion pending a decision on transfer based on its determination that:

[I]t is likely that in ruling on remand motions that involve similar issues that arise under the laws of many other states, the MDL court will adopt an approach that treats like cases in a uniform manner” and that “the objectives of the MDL process – namely the avoidance of inconsistent rulings and the conservation of judicial resources – are best met by allowing the MDL Court to decide plaintiff’s motion to remand.

Id., at *5.

As one Court put it, “consideration of the jurisdictional issues in a single court will result in national uniformity on the question.” *Quincy Cmty. Svcs. Dist. v. Atlantic Richfield Co.*, No. Civ. 5-03-2582 (LKK/DAD), 2004 U.S. Dist. LEXIS 29496, at *13 (E.D. Cal. Mar. 25, 2004) (granting stay and deferring remand motion to transferee judge); *see also Krieger v. Merck & Co.*, 2005 U.S. Dist. LEXIS 27633, at *3-4 (citing *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) for the proposition that “the jurisdictional issue in question is easily capable of arising in more than one court, [and thus] consistency as well as economy is served by transferring and consolidating cases as to which remand motions are pending”).

C. Plaintiff Will Not Be Prejudiced If This Court Stays All Proceedings Pending The JPML’s Decision On Transfer

Plaintiff will not be prejudiced if the limited stay is granted. Issuance of the transfer order will occur as soon as the JPML can process the application. In the meantime, Defendants are not seeking to halt all litigation; on the contrary, discovery is proceeding under

arrangements previously worked out by counsel. Defendants will work with Plaintiff and the JPML to expedite the transfer. *See, e.g., Good v. Prudential Ins. Co. of Am.*, 5 F. Supp.2d 804, 809 (N.D. Cal. 1998) (granting a stay where “a stay pending a final decision by the MDL Panel would likely be brief”); *Tench v. Jackson Nat’l Life Ins. Co.*, No. 99 C 5182, 1999 WL 1044923, at *2 (N.D. Ill. Nov. 12, 1999) (same); *New Mexico State Inv. Council v. Alexander*, 317 B.R. 440, 446 (D.N.M. 2004) (same).

Even assuming some initial delay, the long-run benefits of a stay greatly outweigh the minimal short-run costs of a delay. *See, e.g., Rosenfeld v. Hartford Fire Ins. Co.*, Nos. 88 CIV. 2153 (MJL), 88 CIV. 2252 (MJL), 1988 WL 49065, at *2 (S.D.N.Y. May 12, 1988) (“While [plaintiffs] may suffer some initial delay, once the cases are coordinated and the defendants are able to respond to all the complaints in a coordinated manner, more time may well be saved than lost.”); *Egon v. Del-Val Fin. Corp.*, Civ. A. No. 90-4338, 1991 WL 13726, at *1 (D.N.J. Feb. 1, 1991) (“[E]ven if a temporary stay can be characterized as a delay prejudicial to plaintiffs, there are considerations of judicial economy and hardship to defendants that are compelling enough to warrant such a delay.”); *Bledsoe v. Jannsen Pharmaceutica et al.*, No. 4:05 CV 02330 (ERW), 2006 U.S. Dist. Lexis 5524, at *3 (E.D. Mo. Feb. 13, 2006) (“[A]lthough Plaintiff might well be subjected to some delay as a result of the issuance of a stay, that prejudice does not outweigh the judicial economy interests described above.”).

D. Defendants Will Be Severely Prejudiced If This Court Does Not Stay Proceedings Pending The JPML’s Decision On Transfer

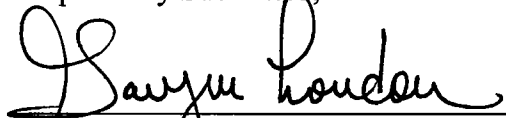
If a stay is not granted, Defendants will be prejudiced by the duplication of efforts required and the risk, indeed the likelihood, of conflicting rulings. This is particularly true for Dey which now has a national AWP suit pending in the District of Massachusetts that overlaps with the fifteen cases recently removed.

CONCLUSION

For the foregoing reasons, Dey requests that this Court stay consideration of Plaintiff's motion to remand pending the transfer of this action by the JPML to Judge Saris in the United States District Court for the District of Massachusetts.

Dated this 31st day of October, 2006.

Respectfully Submitted,



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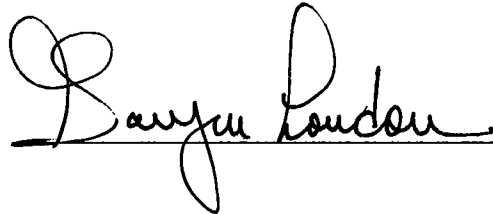
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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel. I further certify that I have, on this day, served the foregoing on counsel of record shown on the attached Service List through the LexisNexis File and Serve system, pursuant to Case Management Order No. 2.

A handwritten signature in black ink, reading "Danyu London", is written over a horizontal line.

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--- F.Supp.2d ---

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

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Page 1

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Briefs and Other Related Documents

In re Pharmaceutical Industry Average Wholesale Price Litigation D.Mass., 2006. Only the Westlaw citation is currently available.

United States District Court, D. Massachusetts.

In re PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION.

This Document Relates To:

State of Arizona

v.

Abbott Labs, Inc., et al.

MDL No. 1456.

Civil Action No. 01-12257-PBS.

Civ. Action No. 1:06-CV-11069-PBS.

Oct. 24, 2006.

Background: State of Arizona brought action in its own capacity and as parens patriae on behalf of Medicare beneficiaries, third-party payors, and other state residents in state court against various pharmaceutical companies, alleging that they violated state law by fraudulently misrepresenting prescription drug prices. Defendants removed. State moved to remand.

Holding: The District Court, Saris, J., held that Arizona's state-law claims based on the meaning of "average wholesale prices" (AWP) in the federal Medicare statute raised a substantial federal issue.

Motion denied.

[1] Removal of Cases 334

334 Removal of Cases

A party seeking to remove a case to federal court has the burden of demonstrating the existence of federal jurisdiction.

[2] Removal of Cases 334

334 Removal of Cases

Because the removal statute should be strictly construed, any doubts about the propriety of removal should be construed against the party seeking removal.

[3] Removal of Cases 334

334 Removal of Cases

Arizona's state-law claims on behalf of Medicare Part B beneficiaries based on the meaning of "average wholesale prices" (AWP) in the federal Medicare statute raised a substantial federal issue that belonged in the federal court; the government had a strong national interest in prohibiting fraud upon Medicare beneficiaries because fraudulent acts threaten Medicare's integrity, and, once the meaning of AWP was determined, it could be applied to the many pending similar pharmaceutical drug pricing cases in the Medicare context, impacting the viability and effectiveness of the federal Medicare program. Social Security Act, § 1842(o), 42 U.S.C.A. § 1395u(o); A.R.S. §§ 36-2901, 44-1522(A).

MEMORANDUM AND ORDER

SARIS, U.S.D.J.

I. INTRODUCTION

*1 The State of Arizona brought this action in its own capacity and as parens patriae on behalf of Medicare beneficiaries, third-party payors, and other state residents in state court against various pharmaceutical companies, alleging that they violated state law by fraudulently misrepresenting prescription drug prices. Defendants removed the suit on the ground that plaintiff bases its claims on a specific interpretation of the term "average wholesale price" in the federal Medicare statute, 42 U.S.C. § 1395u(o). Arguing that there is no substantial and disputed federal issue, plaintiff seeks remand to state court. Plaintiff's motion to remand is **DENIED**.

II. BACKGROUND

The State of Arizona, through its Attorney General, brought suit against more than twenty pharmaceutical manufacturers, alleging that they fraudulently and grossly inflated the prices of drugs to consumers by misstating the "Average Wholesale Prices" ("AWPs") of their drugs in industry publications. (Compl. ¶¶ 1-2.) Plaintiff claims that the inflated drug prices were used for repayment by Arizona's Medicaid program, Medicare Part B beneficiaries,

--- F.Supp.2d ---

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

Page 2

third-party payors and Arizona residents purchasing drugs outside these programs. (Compl.¶ 2.) Arizona asserts the claims on behalf of itself, Medicare beneficiaries and other Arizona residents. Plaintiff asserts two state law causes of action: a claim for violation of the Arizona Consumer Fraud Act, Ariz.Rev.Stat. § 44-1522(A) (2006); and racketeering under Arizona's Racketeering Act, Ariz.Rev.Stat. § 13-2301, et seq. (2006). (Compl.¶¶ 569-85.)

This Court has entertained many similar AWP claims since 2001, and has fully explained the operation of the drug reimbursement procedures in prior opinions with which the Court assumes familiarity. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61 (D.Mass.2005).

To recap, Medicare is a purely federal program that provides health insurance to individuals age 65 and older, as well as other qualifying individuals. *See* 42 U.S.C. § 1395c (2006). Until 2005, Medicare Part B covered certain classes of prescription drugs. *See id.* §§ 1395j-1395w. Under Part B, the federal government paid 80 percent of the allowable cost of covered drugs and the beneficiary was responsible for the remaining 20 percent. *See id.* § 1395l. From 1998 until 2004, the Medicare statute set reimbursement of covered drugs at the lesser of the actual charge on the Medicare claim form or 95 percent of AWP. 42 U.S.C. § 1395u(o); 42 C.F.R. § 405.517(b) (2006). In 2004, reimbursement under the statute was reduced to 85 percent of AWP. 42 U.S.C. § 1395u(o); 42 C.F.R. § 414.707. As of January 1, 2005 the reimbursement rate no longer depends upon AWP. *See* 42 C.F.R. § 414.904.

Defendant pharmaceutical manufacturers set the AWP for each of their drugs. The manufacturers send their AWP to industrial publications, such as *First DataBank* or *Red Book*, that compile and publish a list of the AWP for most available drugs. Pursuant to the statute, Medicare reimbursed providers, such as pharmacies and doctors, for a drug based on its published AWP. When the price paid by a provider to the wholesaler or drug manufacturer was less than the reimbursement the provider received, the provider pocketed the difference, or "spread." By creating large spreads, the pharmaceutical companies marketed their drugs to providers, who have great discretion in determining which drugs to administer. Arizona Medicare Part B beneficiaries bore part of the burden of this spread by paying a 20 percent co-payment of a grossly inflated AWP.

*2 Arizona, as well as third-party payors (primarily private insurers and health and welfare plans) reimburse physicians and pharmacies for certain drugs based upon AWP. This includes contractors under Arizona's Medicaid program, the Arizona Health Care Cost Containment System ("AHCCCS"). *See Ariz.Rev.Stat. § 36-2901, et seq.* (2006). The AHCCCS Administration contracts with health plans and other contractors to provide eligible low-income Arizona residents with a range of health care services, including prescription drugs. Additionally, the AHCCCS Administration directly pays for health care services, including prescription drugs, for persons receiving benefits through the Indian Health Service, the Federal Emergency Services program, Qualified Medicare Beneficiary programs, and the State Emergency Services program. Plaintiff alleges that both the state Medicaid contractors and the AHCCCS Administration paid inflated reimbursement prices for prescription drugs based upon defendants' reported AWP.

Plaintiff filed this complaint in Arizona state court on December 6, 2005. Arizona seeks to return to its residents the increased medication costs caused by defendants' wrongful conduct, to disgorge defendants "excessive profits" and to enjoin further violations of Arizona law. Defendants removed the case on January 5, 2006 to the District Court for the District of Arizona. On January 30, 2006, the Judicial Panel on Multidistrict Litigation ("JPML") issued a conditional transfer order, which was opposed by plaintiffs. On June 16, 2006, the JPML denied plaintiff's motion to vacate the conditional transfer order and ordered the case to be transferred to this Court. Plaintiff filed a timely motion to remand the case on August 11, 2006.

III. DISCUSSION

[1][2] A party seeking to remove a case to federal court has the burden of demonstrating the existence of federal jurisdiction. *See BIW Deceived v. Local 56*, 132 F.3d 824, 831 (1st Cir.1997). Because the removal statute should be strictly construed, any doubts about the propriety of removal should be construed against the party seeking removal. *See, e.g., Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 4 (1st Cir.1999). Jurisdiction must be evident from the basis of the well-pleaded complaint; a defense based in federal law is inadequate to confer jurisdiction on this Court. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) ("Merrell Dow").

--- F.Supp.2d ---

Page 3

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

The Supreme Court's recent decision in Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005) explains the method for determining federal question jurisdiction when, as in this case, a federal question is embedded in state-law claims. Clarifying conflicting interpretations of *Merrell Dow*, the Supreme Court held that a claim need not be brought under federal law for there to be valid federal question jurisdiction. *Id.* at 317-18; McCready v. White, 417 F.3d 700, 702-03 (7th Cir.2005) (noting that *Grable* put the "kibosh" on the possibility that a federal cause of action was necessary to establish federal question jurisdiction). The Court laid out a three part inquiry for determining the existence of federal question jurisdiction: "does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. The Court guided lower courts to engage in a "contextual inquiry" that examines "the importance of having a federal forum for the issue, and the consistency of such a forum with Congress's intended division of labor between state and federal courts." *Id.* at 318-19.

*3 Plaintiff alleges that the pharmaceutical companies intentionally inflated the AWP for their drugs, knowing that those inflated figures would be used as the basis for prescription drug co-payments by Arizona Medicare beneficiaries in violation of the Arizona Consumer Fraud Act and the Arizona Racketeering Act, and that these state law claims do not raise any federal issues. Defendants argue that the plaintiff's theory of recovery necessarily raises the substantial federal issue of the meaning of AWP under the Medicare statute, which affects both liability and damages.

This is not the first time that this court has addressed the meaning of "AWP" under Medicare in the context of a motion to remand. In State of Montana v. Abbott Labs., 266 F.Supp.2d 250 (D.Mass.2003), the state alleged that its Medicare beneficiaries overpaid based on defendant drug manufacturers' overstatements of AWP. Agreeing with the defendants that an essential element of the *parens patriae* claim was proof of a discrepancy between the AWP's reported by the pharmaceutical companies and the meaning of AWP under the Medicare statute, the Court held: "The adjudication of whether the term 'average wholesale price' in the Medicare statute embraces a 'spread' could have broad implications

for Medicare reimbursements and co-payments." *Id.* at 255. That case, however, was decided before the *Grable* decision. At that time, under First Circuit precedent, I interpreted *Merrell Dow* to preclude the exercise of federal jurisdiction where the federal statute did not provide a private remedy. *Id.* at 257; see also Minnesota v. Pharmacia Corp., 278 F.Supp.2d 101, 103 (D.Mass.2003) ("[T]he First Circuit and a number of other courts read *Merrell Dow* as an instruction to remand state-law claims like Minnesota's, where the right to relief depends on the application of a federal statute that does not provide a private remedy."). Because the Medicare statute did not have a private cause of action, this court therefore remanded the case back to the state court.

[3] It is now clear under *Grable* that the lack of a private federal cause of action does not preclude jurisdiction. This court, recently reviewing the *Montana* decision, reaffirmed that the meaning of the term AWP under the federal Medicare statute is a "weighty federal question." *In re Pharm. Indus. Average Wholesale Price Litig.*, 2006 U.S. Dist. LEXIS 63655, at *24 (Sept. 6, 2006). However, in that case, I remanded the state-law action which sought relief solely under the state Medicaid statute. While that state statute used the term "Average Wholesale Price" there was no indication in the statute, legislative history or caselaw that it should be construed in sync with the federal statute.

Using *Grable* eyes in analyzing this *parens patriae* action, I (again) conclude that the meaning of AWP in the federal Medicare statute is a substantial federal issue that properly belongs in federal court. The government has a strong national interest in prohibiting fraud upon Medicare beneficiaries because fraudulent acts threaten Medicare's integrity. Fischer v. United States, 529 U.S. 667, 681, 120 S.Ct. 1780, 146 L.Ed.2d 707 (2000); see *Grable*, 545 U.S. at 315 (noting that the meaning of the federal tax provision is an "important issue of federal law" because the government has a "strong interest" in the prompt collection of taxes). The interpretation of AWP under the statute determines whether the Arizona Medicare beneficiaries, by definition the sick and elderly, overpaid on their drug co-payments. Furthermore, once the meaning of AWP is determined, it can be applied to the many pending similar pharmaceutical drug pricing cases in the Medicare context. See Empire HealthChoice Assur. Inc. v. McVeigh, --- U.S. ---, ---, 126 S.Ct. 2121, 2137, 165 L.Ed.2d 131 (2006) (noting that in *Grable* an important factor favoring jurisdiction was that the resolution of the embedded federal question would

--- F.Supp.2d ---

Page 4

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

control numerous similar tax cases). This directly impacts the viability and effectiveness of the federal Medicare program. Arizona's state-law claims on behalf of Medicare Part B beneficiaries based on the meaning of AWP in the federal statute therefore raise a substantial federal issue.

*4 Under *Grable*, the federal issue must also be "actually disputed" in the litigation. *Grable*, 545 U.S. at 314. The Medicare statute does not define the term AWP. See 42 U.S.C. § 1395u(o); *id.* § 1395x ("Definitions" section). For plaintiff to succeed on the asserted theory of liability, the AWP's reported by defendants must be different from the AWP required under the Medicare statute. From day one of the litigation, defendants have vigorously protested that Congress understood that AWP did not represent the actual cost that providers paid for drugs. The determination of the actual meaning of AWP under the Medicare statute has been hotly disputed in the multi-district litigation and is a crucial component of plaintiff's theory of liability.

The final question under *Grable* is whether granting federal jurisdiction will disturb "any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. Federal jurisdiction over a matter should not "materially affect, or threaten to affect, the normal currents of litigation." *Id.* at 319. Here, "raising Arizona" from state to federal jurisdiction is unlikely to upset any balance because of the substantial number of similar cases that are already pending in federal courts. The claims that Arizona brings on behalf of its Medicare Part B beneficiaries raise the same issues that are currently before this court in a multi-district litigation that involves over ninety similar pharmaceutical pricing cases. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 66-67 (D.Mass.2005). Medicare Part B beneficiaries make up the first class of plaintiffs in that litigation. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 233 F.R.D. 229, 230 (D.Mass.2006). Finally, as one district court aptly stated: "There is ... no congressionally approved balance of judicial responsibilities in this arena. During the approximately 13 years that the price controls have been in place, both state and federal courts have heard cases related to the statutes directly governing them." *County of Santa Clara v. Astra USA, Inc.*, 401 F.Supp.2d 1022, 1029 (N.D.Cal.2005).

It is true that other district courts reached contrary post-*Grable* decisions in similar cases involving a state's *parens patriae* claims on behalf of Medicare

Part B beneficiaries. See *Commonwealth of Pennsylvania v. Tap Pharm. Prods.*, 415 F.Supp.2d 516, 524-25 (E.D.Pa.2005) (remanding under *Grable* upon finding that (1) "the term 'average wholesale price' is not 'actually disputed' because the Commonwealth does not premise its *parens patriae* claim on the construction of these words as they appear in the applicable Medicare statute and regulations" and (2) there is no substantial federal question because "AWP is no longer the standard for reimbursement under Medicare" and "a court would not need to construe the term 'average wholesale price' beyond its plain meaning"); *Wisconsin v. Abbott Labs.*, 390 F.Supp.2d 815, 823 (W.D.Wis.2005) (remanding under *Grable* upon finding that granting jurisdiction would disturb the federal and state court balance because "[a]t best the federal and state interests are equivalent" and "shifting all of these [state filed pharmaceutical pricing cases] ... into federal court would work a significant disruption in the division of labor between federal and state courts"). As the judge assigned the massive multi-district litigation, involving class actions and numerous attorney general suits, I conclude that the issue of the meaning of AWP under the federal Medicare statute has national significance. A federal forum provides experience, solicitude and uniformity on this important federal issue. See *Grable*, 545 U.S. at 312.

*5 Citing *Grable* and *Merrell Dow*, plaintiff also argues that the absence of both a federal cause of action and of federal preemption of state remedies weighs heavily against a finding of federal jurisdiction. See *Grable*, 545 U.S. at 318; *Merrell Dow*, 478 U.S. at 811-14. While the presence of a federal cause of action is a welcome mat, its absence is not a deadbolt. Rather, the absence of a federal cause of action or of federal preemption of state remedies is "an important clue to Congress's conception of jurisdiction." *Grable*, 545 U.S. at 318 (emphasis added). In *Merrell Dow*, the Court was concerned that the exercise of federal jurisdiction in those circumstances "would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." *Id.* As explained above, granting federal jurisdiction in this case does not open the door to a horde: the horde has already stormed the border. Arizona's state law claims on behalf of Medicare Part B beneficiaries raise a substantial, actually disputed federal issue that does not threaten the balance of judicial responsibilities.

The Court has supplemental jurisdiction over

--- F.Supp.2d ---

Page 5

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

Arizona's claims on behalf of the third-party payors, private payors and state Medicaid contractors making drug payments outside of the Medicare Part B program. *See* 28 U.S.C. § 1367(a) (2006) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."); *see also City of Chi. v. Int'l College of Surgeons*, 522 U.S. 156, 165, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997) ("[Section 1367(a)] applies with equal force to cases removed to federal court as to cases initially filed there.").

ORDER

The motion to remand (Docket No. 2974) is ***DENIED***.

D.Mass., 2006.

In re Pharmaceutical Industry Average Wholesale Price Litigation

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

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- [2006 WL 2546091](#) (Trial Motion, Memorandum

and Affidavit) Plaintiffs' Memorandum in Opposition to BMS Defendants' Motion for Summary Judgment as to Class 3 (Aug. 30, 2006) Original Image of this Document (PDF)

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- [2006 WL 2546086](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Defendants' Opposition to Plaintiff State of Arizona's Motion for Remand (Aug. 25, 2006) Original Image of this Document (PDF)
- [2006 WL 2546085](#) (Trial Motion, Memorandum and Affidavit) Defendants' Reply to the State of Nevada's Opposition to Defendants' Third Motion to Compel Discovery (Aug. 24, 2006) Original Image of this Document (PDF)
- [2006 WL 2400084](#) (Trial Motion, Memorandum and Affidavit) Class Plaintiffs' Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed Nationwide GSK Class Settlement, Certification of Settlement Class and Approval of Notice Plan (Aug. 10, 2006) Original Image of this Document (PDF)
- [2006 WL 2400085](#) (Proposed Order, Agreement and Settlement) Settlement Agreement and Release of the Glaxosmithkline Defendants (Aug. 10, 2006) Original Image of this Document (PDF)
- [2006 WL 2546088](#) (Trial Motion, Memorandum and Affidavit) Track Two Defendants' Memorandum in Opposition to Class Certification Redacted Version" (Jun. 15, 2006) Original Image of this Document (PDF)
- [2006 WL 2544681](#) () Expert Report of Zachary Dyckman in Support of Track 2 Defendants' Opposition to Class Certification (Jun. 14, 2006) Original Image of this Document (PDF)
- [2006 WL 1372573](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment Against all Track 1 Defendants (Apr. 28, 2006) Original Image of this Document (PDF)
- [2006 WL 1372574](#) (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Schering-Plough Corporation's and Warrick Pharmaceuticals Corporation's Motion for Summary Judgment as to Class 2 Claims (Apr. 28, 2006) Original Image of this Document (PDF)
- [2006 WL 1372575](#) (Trial Motion, Memorandum and Affidavit) The BMS Defendants' Reply Memorandum of Law in Support of Their Motion for Summary Judgment (Apr. 28, 2006) Original Image of this Document (PDF)

--- F.Supp.2d ----

Page 6

--- F.Supp.2d ----, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ----)

- [2006 WL 1372576](#) (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of Track 1 Defendants' Joint Motion for Summary Judgment (Apr. 28, 2006) Original Image of this Document (PDF)
- [2006 WL 1372569](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendant Chiron Corporation's Motion to Dismiss (Apr. 24, 2006) Original Image of this Document (PDF)
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- [2006 WL 1372571](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Eli Lilly and Company's Separate Memorandum in Support of Motion to Dismiss (Apr. 24, 2006) Original Image of this Document (PDF)
- [2006 WL 1372572](#) (Trial Motion, Memorandum and Affidavit) Plaintiff Ven-a-Care of the Florida Keys, Inc.'s Opposition to Defendant Bristol-Myers Squibb Company's Motion to Compel (Apr. 24, 2006) Original Image of this Document (PDF)
- [2006 WL 1372568](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Consolidated Opposition to Defendants' Motion to Dismiss (1) the Consolidated Complaint of the City of New York and New York Counties and (2) Nassau County's Second Amended Complaint (Apr. 20, 2006) Original Image of this Document (PDF)
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- [2006 WL 1372563](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendant Wyeth's Supplemental Memorandum in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372564](#) (Trial Motion, Memorandum

and Affidavit) New York Counties Consolidated Opposition to Defendants' Motion to Dismiss the Mnycc (Apr. 17, 2006) Original Image of this Document (PDF)

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- [2006 WL 1372580](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Biogen Idec Inc.'s Separate Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
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- [2006 WL 1372582](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Individual Memorandum of Law in Defendant EMD, Inc. In Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372583](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendant Endo Pharmaceutical Inc.'s Individual Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372584](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendants Forest Laboratories Inc. and Forest Pharmaceuticals, Inc.'s Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
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- [2006 WL 1372586](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Separate Memorandum of Merck & Co. In Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372587](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to the Mylan Defendants' Individual Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372588](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendant Novartis Pharmaceuticals Corporation's Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this

--- F.Supp.2d ----

Page 7

--- F.Supp.2d ----, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ----)

Document (PDF)

- [2006 WL 1372589](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Individual Memorandum of Defendants Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc. In Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372590](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Separate Memorandum of the ""Pfizer Defendants" in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372591](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to the Roche Defendants' Supplemental Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372592](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Sanofi-Synthelabo's Individual Memorandum of Law in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 1372593](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendant Tap Pharmaceutical Products Inc.'s Supplemental Memorandum in Support of Defendants' Joint Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
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- [2006 WL 1372720](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendant Amgen Inc's Individual Memorandum in Support of Motion to Dismiss (Apr. 17, 2006) Original Image of this Document (PDF)
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- [2006 WL 983922](#) (Trial Motion, Memorandum and

Affidavit) Defendants' Opposition to Plaintiffs' Objections Pursuant to Rule 201(e) of the Federal Rules of Evidence to Judicial Notice of Facts and Conclusions Set Forth in Defendants' Motion to Dismiss (Apr. 3, 2006) Original Image of this Document (PDF)

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• [2006 WL 900606](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Schering-

--- F.Supp.2d ---

Page 8

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

Plough Corporation's and Warrick Pharmaceuticals Corporation's Motion for Summary Judgment as to Class 2 Claims (Mar. 15, 2006) Original Image of this Document (PDF)

- [2006 WL 900607](#) (Trial Motion, Memorandum and Affidavit) Class Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment on Defendants' Affirmative Defenses (Mar. 15, 2006) Original Image of this Document (PDF)
- [2006 WL 900608](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment Against All Track 1 Defendants YRedacted Version" (Mar. 15, 2006) Original Image of this Document (PDF)
- [2006 WL 900603](#) (Trial Motion, Memorandum and Affidavit) Opposition of Plaintiff Blue Cross and Blue Shield of Massachusetts, Inc. to Track Two Defendants' Motion to Compel (Mar. 14, 2006) Original Image of this Document (PDF)
- [2006 WL 900604](#) (Trial Motion, Memorandum and Affidavit) Track Two Defendants' Motion to Strike Portions of the Fourth Amended Master Consolidated Class Action Complaint and Notice of Errata (Mar. 13, 2006) Original Image of this Document (PDF)
- [2006 WL 900602](#) (Trial Motion, Memorandum and Affidavit) Non-Party National Heritage Insurance Company's Opposition to Defendants' Emergency Motion to Expedite the Briefing and Hearing on Their Motion to Compel Production of Documents and Witnesses Pursuant to Subpoena (Mar. 8, 2006) Original Image of this Document (PDF)
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- [2006 WL 690405](#) (Trial Motion, Memorandum and Affidavit) Separate Memorandum of the "Pfizer Defendants" in Support of Their Motion to Dismiss (1) the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690406](#) (Trial Motion, Memorandum and Affidavit) Defendant Tap Pharmaceutical Products Inc.'s Supplemental Memorandum in Support of Defendants' Joint Motion to Dismiss (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690407](#) (Trial Motion, Memorandum and Affidavit) Defendants Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc.'s Memorandum of Law

of in Support of Motion to Dismiss (1) the Consolidated Complaint of New York City and New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)

- [2006 WL 690408](#) (Trial Motion, Memorandum and Affidavit) Astrazeneca Defendants' Individual Memorandum of Law In Support of Their Motion to Dismiss the Consolidated Complaint of New York City and New York Counties other than Nassau and the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690409](#) (Trial Motion, Memorandum and Affidavit) Defendant Endo Pharmaceuticals Inc.'s Individual Memorandum of Law in Support of Its Motion to Dismiss the Consolidated Complaint of New York City and Plaintiff New York Counties Other than Nassau (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690410](#) (Trial Motion, Memorandum and Affidavit) Separate Memorandum of Defendant Boehringer Ingelheim Corporation in Support of Its Motion to Dismiss (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690411](#) (Trial Motion, Memorandum and Affidavit) Defendant Medimmune, Inc.'s Memorandum of Law in Support of Motion to Dismiss (1) the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690412](#) (Trial Motion, Memorandum and Affidavit) Defendant Sandoz Inc's Supplemental Memorandum of Law Regarding Multiple Source Generic Drug Products in Support of Defendants' Motion to Dismiss the Corrected Consolidated Complaint and the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690413](#) (Trial Motion, Memorandum and Affidavit) The Mylan Defendants' Individual Memorandum of Law in Support of Their Motion to Dismiss (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690414](#) (Trial Motion, Memorandum and Affidavit) Individual Memorandum of Purdue Pharma L.P., Purdue Frederick Company, and Purdue Pharma Company in Support of Their Motion to Dismiss (1) the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)

--- F.Supp.2d ---

Page 9

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

- [2006 WL 690415](#) (Trial Motion, Memorandum and Affidavit) Defendants' Joint Memorandum of Law in Support of Motion to Dismiss (1) the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690416](#) (Trial Motion, Memorandum and Affidavit) Separate Memorandum of Merck & Co., Inc. in Support of Its Motion to Dismiss (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690417](#) (Trial Motion, Memorandum and Affidavit) The Roche Defendants' Supplemental Memorandum of Law in Support of Motions to Dismiss (1) the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690418](#) (Trial Motion, Memorandum and Affidavit) Biogen Idec Inc.'s Separate Memorandum of Law in Support of Its Motion to Dismiss (1) the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau and (2) the Second Amended Complaint of Nassau County (Mar. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 690401](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion to Dismiss the First Amended Complaint in Intervention (Mar. 2, 2006) Original Image of this Document (PDF)
- [2006 WL 690402](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Opposition to Defendant B. Braun of America, Inc.'s Separate Motion to Dismiss the First Amended Complaint (Mar. 2, 2006) Original Image of this Document (PDF)
- [2006 WL 690403](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Opposition to Defendant Abbott Laboratories, Inc.'s Separate Motion to Dismiss the First Amended Complaint (Mar. 2, 2006) Original Image of this Document (PDF)
- [2006 WL 690420](#) (Trial Pleading) Fourth Amended Master Consolidated Class Action Complaint Amended to Comply With Court's Class Certification Order Redacted Version (Mar. 1, 2006) Original Image of this Document (PDF)
- [2006 WL 900615](#) (Trial Pleading) Fourth Amended Master Consolidated Class Action Complaint Amended to Comply With Court's Class Certification Order Unredacted Version (Mar. 1, 2006) Original Image of this Document (PDF)

- [2006 WL 690400](#) (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Track Two Defendants' Motion to Compel Plaintiff Blue Cross Blue Shield of Massachusetts, Inc. and Third-Party National Heritage Insurance Company in Their Capacities as the Medicare Part B Carriers for Massachusetts to Produce Documents and Witnesses for Deposition Pursuant to Subpoena (Feb. 28, 2006) Original Image of this Document (PDF)
- [2006 WL 690399](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Plaintiffs' Second Motion to Compel Production by Amgen, Inc., with Request for Expedited Briefing and Disposition (Feb. 27, 2006) Original Image of this Document (PDF)
- [2006 WL 372092](#) (Trial Motion, Memorandum and Affidavit) Defendants' Second Motion to Compel Discovery from Plaintiffs the State of Nevada and the State of Montana (Jan. 31, 2006) Original Image of this Document (PDF)
- [2006 WL 372090](#) (Trial Motion, Memorandum and Affidavit) Non-Party Fallon Community Health Plan, Inc.'s Memorandum of Law in Support of its Motion to Quash the Subpoena of Defendant Dey, Inc. (Jan. 27, 2006) Original Image of this Document (PDF)
- [2006 WL 372089](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply to Track 1 Defendants' Response to Plaintiffs' Proposed Consolidated Order Re: Motion for Class Certification (Jan. 26, 2006) Original Image of this Document (PDF)
- [2006 WL 372087](#) (Trial Motion, Memorandum and Affidavit) Defendant Dey, Inc.'s Memorandum of Law in Opposition to Non-Party Fallon Community Health Plan, Inc.'s Motion to Stay Discovery (Jan. 23, 2006) Original Image of this Document (PDF)
- [2006 WL 372085](#) (Trial Motion, Memorandum and Affidavit) Abbott Laboratories Inc.'s Individual Memorandum in Support of Motion to Dismiss California's First Amended Complaint (Jan. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 372086](#) (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum of Law in Support of Their Motion to Dismiss the First Amended Complaint-In-Intervention (Jan. 17, 2006) Original Image of this Document (PDF)
- [2006 WL 353283](#) (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum in Opposition to Plaintiffs' Motion to Participate in January 27th Hearing (Jan. 12, 2006) Original Image of this Document (PDF)
- [2006 WL 372084](#) (Trial Motion, Memorandum and Affidavit) Brief of Amici Curiae in Opposition to Motion by State of Florida and Ven-A-Care to Participate in January 27th Hearing Regarding Remand (Jan. 12, 2006) Original Image of this

--- F.Supp.2d ---

Page 10

--- F.Supp.2d ---, 2006 WL 3019193 (D.Mass.)

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- [2006 WL 372082](#) (Trial Motion, Memorandum and Affidavit) Defendants' Reply Brief in Support of Their Emergency Motion for an Order Holding Plaintiffs in Contempt, for Preservation of Potentially Relevant Documents, and for an Accounting of Spoliated Documents (Jan. 6, 2006) Original Image of this Document (PDF)
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- [2005 WL 2122060](#) (Trial Pleading) First Amended Complaint in Intervention for Money Damages and Civil Penalties for Violations of the California False Claims Act (Aug. 24, 2005)
- [2005 WL 4705055](#) (Trial Deposition and Discovery) Deposition Upon Oral Examination of Marsha Peterson (Apr. 13, 2005) Original Image of this Document (PDF)
- [2005 WL 3979850](#) () Report of Independent Expert Professor ERNST R. BERNDT (Feb. 9, 2005) Original Image of this Document (PDF)
- [2003 WL 24251803](#) (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Plaintiffs' Motion for a Protective Order Regarding Subpoenas to Putative Class Members (Dec. 3, 2003) Original Image of this Document (PDF)
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- [2003 WL 24251800](#) (Trial Motion, Memorandum and Affidavit) Suffolk County's Opposition to the Defendant-Specific Memoranda in Support of Motion to Dismiss (Oct. 30, 2003) Original Image of this Document (PDF)
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- [2003 WL 24251798](#) (Trial Motion, Memorandum and Affidavit) Plaintiff Robert J. Swanston's Supplemental Memorandum in Support of Motion for Remand (Sep. 30, 2003) Original Image of this Document (PDF)
- [2003 WL 24251795](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs Rice and Thompsons' Memorandum of Law in Support of Joint Opposition to Motion to Compel Jurisdictional Discovery (Sep. 26, 2003) Original Image of this Document (PDF)
- [2003 WL 24251796](#) (Trial Motion, Memorandum and Affidavit) Lead Counsel's Reply to Defendant Tap Pharmaceutical Products Inc.'s Motion for Protective Order (Sep. 26, 2003) Original Image of this Document (PDF)
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- [2003 WL 24251792](#) (Trial Motion, Memorandum and Affidavit) The Together Rx Defendants' Brief in

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Page 11

--- F.Supp.2d ----, 2006 WL 3019193 (D.Mass.)

(Cite as: --- F.Supp.2d ---)

Support of Their Motion to Dismiss Counts V, VI, VII, VIII, and X of the Amended Complaint (Aug. 1, 2003) Original Image of this Document (PDF)

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- 2003 WL 24251790 (Trial Motion, Memorandum and Affidavit) Plaintiff Congress of California Senior's Memorandum of Law in Support of Motion to Remand (Jul. 22, 2003) Original Image of this Document (PDF)
- 2003 WL 24251789 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Plaintiffs' Motion to Remand Actions to California Superior Court (Jul. 18, 2003) Original Image of this Document (PDF)
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- 2003 WL 24258450 (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Further Support of Motion for Reconsideration or, in the Alternative, for Certification of an Interlocutory Appeal (Jun. 30, 2003) Original Image of this Document (PDF)
- 2003 WL 24251785 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion for Reconsideration, or in the Alternative, for Certification of an Interlocutory Appeal (Jun. 18, 2003) Original Image of this Document (PDF)
- 2003 WL 23675674 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion for Leave to Amend the Master Consolidated Class Action Complaint (Jun. 12, 2003)
- 2003 WL 24251784 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss by Defendant Fujisawa USA, Inc. (Apr. 18, 2003) Original Image of this Document (PDF)
- 2002 WL 32968805 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Motion to Strike Paragraphs 155-56 of the Master Complaint and Motion for a More Definite Statement from Certain Paragraphs of the

Master Complaint (Dec. 5, 2002) Original Image of this Document (PDF)

- 2002 WL 32968804 (Trial Motion, Memorandum and Affidavit) Abbott Laboratories' Memorandum of Law in Support of Its Motion to Dismiss (Nov. 4, 2002) Original Image of this Document (PDF)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII,)	
)	
Plaintiff,)	CV. NO. 06-00437 DAE-BMK
)	
vs.)	AMENDED FINDING AND
)	RECOMMENDATION THAT
ABBOTT LABORATORIES, INC.;)	PLAINTIFF STATE OF HAWAII'S
ALPHARMA USPD, INC.;)	MOTION TO REMAND BE
APOTHECON, INC.;)	GRANTED
ASTRAZENECA)	
PHARMACEUTICALS LP;)	
ASTRAZENECA LP; AVENTIS)	
PHARMACEUTICALS, INC.;)	
AVENTIS BEHRING LLC n/k/a/)	
ZLB BEHRING LLC; BARR)	
LABORATORIES, INC.; BAXTER)	
HEALTHCARE CORPORATION;)	
BAYER CORPORATION; BEN)	
VENUE LABORATORIES, INC.;)	
BOEHRINGER INGELHEIM)	
PHARMACEUTICALS, INC.;)	
BOEHRINGER INGELHEIM)	
ROXANE, INC. f/k/a ROXANE)	
LABORATORIES, INC.; BRISTOL-)	
MYERS SQUIBB CO.;)	
CENTOCOR, INC.; DEY, INC.;)	
FOREST PHARMACEUTICALS,)	
INC.; GLAXOSMITHKLEIN)	
PHARMACEUTICALS,)	
HOFFMAN-LAROCHE, INC.;)	
HOSPRIA, INC.; IVAX)	
CORPORATION, INC.; IVAX)	
PHARMACEUTICAL, INC.;)	
JANSSEN PHARMACEUTICAL)	
PRODUCTS, LP; JOHNSON &)	

JOHNSON, INC.; MCNEIL-PPC,)
INC.; MERCK & CO., INC.;)
MYLAN LABORATORIES, INC.;)
MYLAN PHARMACEUTICALS,)
INC.; NOVARTIS)
PHARMACEUTICALS)
CORPORATION; ORTHO)
BIOTECH PRODUCTS, LP; PAR)
PHARMACEUTICAL COS., INC.;)
PFIZER, INC.; PHARMACIA)
CORPORATION; ROCHE)
LABORATORIES, INC.; PUREPAC)
PHARMACEUTICAL CO.;)
SANDOZ, INC.; SCHERING-)
PLOUGH CORPORATION; SICOR)
PHARMACEUTICALS, INC. f/k/a/)
GENSIA SICOR)
PHARMACEUTICALS, INC.; TAP)
PHARMACEUTICAL PRODUCTS,)
INC.; TEVA)
PHARMACEUTICALS USA, INC.;)
WARRICK PHARMACEUTICALS)
CORPORATION; WATSON)
PHARMACEUTICALS, INC.;)
WATSON PHARMA INC., f/k/a)
SCHEIN PHARMACEUTICALS,)
INC.; WATSON LABORATORIES,)
INC.; DOE CORPORATIONS 1-)
100; DOE ENTITIES 1-100.)
)
Defendants.)
_____)

FINDING AND RECOMMENDATION THAT PLAINTIFF STATE OF
HAWAII'S MOTION FOR REMAND BE GRANTED

Before the Court is Plaintiff State of Hawaii's Motion for Remand. After careful consideration of the Motion, memoranda, and arguments of counsel, the Court hereby FINDS & RECOMMENDS that Plaintiff's Motion be GRANTED.

BACKGROUND

Plaintiff State of Hawaii (the "State") filed this action in the Circuit Court of the First Circuit of Hawaii, alleging that Defendants "engage[d] in an unlawful scheme to cause Hawaii and its citizens to pay inflated prices for prescription drugs." (Pl.'s Mem. Supp. Mot. 5-6.) Specifically, the State claims that Defendants published phony "average wholesale prices" ("AWPs") and engaged in other deceptive acts that led to overpayments by both the State Medicaid program and Medicare beneficiaries in Hawaii. The State alleges that these actions violated the Hawaii False Claims Act, the Hawaii Unfair or Deceptive Practices Act, and constituted common law intentional and/or negligent misrepresentation and unjust enrichment.

The State filed its original Complaint on April 27, 2006. No Defendant was served with the Complaint prior to July 21, 2006. However, on May 25, Defendants Schering-Plough Corporation (“Schering Plough”) and its subsidiary Warrick Pharmaceuticals Corporation (“Warrick”) served the State with a Notice of Deposition.

Defendants removed this case to federal court on August 10, 2006. On September 12, 2006, a Conditional Transfer Order for this case was filed by the Judicial Panel on Multidistrict Litigation to transfer the case to the District of Massachusetts for consolidated pretrial proceedings with a number of similar cases. (Defs.’ Mem. Opp. Mot. Ex. A.)

The State now moves for remand for lack of subject matter jurisdiction and untimely filing of the notice of removal.

LEGAL STANDARD

District courts of the United States have original subject-matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2000). Generally, the plaintiff can only invoke this federal question jurisdiction by pleading a cause of action created by federal law. Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S.

308, 125 S.Ct. 2363, 2366 (2005).

In certain cases, however, federal question jurisdiction exists even absent a federal cause of action. Id. at 2366-67. Federal courts have subject matter jurisdiction over state law claims that “implicate significant federal issues.” Id. at 2367. Under Grable, significant federal issues are implicated when the state law claims (1) “necessarily raise a stated federal issue,” (2) which are “actually disputed and substantial,” (3) and which “a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” Id. In Grable, the meaning of a federal tax provision that implicated the government’s ability to satisfy its claims from the property of delinquents constituted a significant federal issue sufficient to create federal jurisdiction. Id. at 2368. A significant federal issue did not exist, however, where a state law tort claim involved an allegation that a drug company had violated a federal branding law. Merrell Dow Pharm., Inc. v. Thomson, 478 U.S. 804 (1986).

When a case involving a federal question is originally filed in state court, the defendants may remove it to federal court. 28 U.S.C. § 1441(b). Removal notices must be filed “within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based” 28

U.S.C. § 1446(b).

Where removal is not proper, the case must be remanded to state court. See 28 U.S.C. § 1447(c) (2000). The removal statute is strictly construed in favor of remand and there is a “strong presumption against removal.” Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). The defendant “always has the burden of establishing that removal is proper.” Id.

DISCUSSION

The State moves for remand of this case on two grounds: first, that the notice of removal was untimely; second, that the Court lacks subject matter jurisdiction over this case. Although the State’s first argument fails, its second argument prevails. This case does not implicate federal issues significant enough for this court to exercise subject matter jurisdiction.

I. TIMELINESS

To be timely, a notice of removal must be filed “within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based” 28 U.S.C. § 1446(b). A defendant’s right to remove is

triggered only by formal process, “not by mere receipt of the complaint unattended by any formal service.” Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 348 (1999). On its face, Defendants’ removal action is timely. The notice of removal was filed on August 10, 2006, less than thirty days after the first Defendant was formally served on July 21.

Nonetheless, the State argues that by serving it with a deposition notice, Schering Plough and Warrick constructively waived service. The State further argues that this waiver of service started the thirty-day removal period for all Defendants, and that therefore the notice of removal was untimely because it was filed more than thirty days after the first Defendant allegedly waived service.

The State’s argument fails for two reasons. First, it is not enough for a defendant to constructively waive service. Under Murphy Bros., a defendant must “agree[] to waive service” in order to start the thirty day removal period. 526 U.S. at 348. There was no such agreement to waive service here.

Second, even if one of the Defendants had agreed to waive service, the thirty day removal period would not have commenced. The only United States Court of Appeals to explicitly address the issue since Murphy Bros. held that under Murphy Bros., the thirty day removal period only begins after the last defendant is served. See Marano Enter. of Kansas v. Z-Teca Rests., 254 F.3d 753, 757 (8th Cir.

2001). The last-served rule has similarly been followed by Ninth Circuit district courts since Murphy Bros.. See, e.g., Tomlinson Black North Idaho v. Kirk-Hughes, 2006 WL 1663591 (D. Idaho June 8, 2006). Because the last Defendant had not even been formally served by August 10, Defendants' notice of removal was timely filed under § 1446(b).

II. FEDERAL QUESTION JURISDICTION

The State also moves for remand on the grounds that the Court lacks subject matter jurisdiction over this case. Here, the State prevails.

Defendants seek to remove this case based on the narrow, but long-standing exception that certain cases implicate federal issues significant enough for federal courts to exercise jurisdiction over them although no federal claims or causes of action are stated. Defendants argue that Hawaii's claim to recover Medicare Part B co-payments on behalf of Hawaii Medicare Part B beneficiaries is just such a case, and that "it requires the resolution of issues of federal law under the Medicare statutes and regulations." (Notice of Removal 7.) In particular, Defendants argue that "[t]he meaning of AWP under the Medicare statute is in dispute and will determine whether the State can succeed on its theory of the case." (Defs.' Mem. Opp. 14.)

Whether the meaning of AWP under the Medicare statute actually does implicate a significant federal issue is governed by Merrell Dow and the three-part test of Grable. Here, it is not disputed that the state law claims meet the threshold requirement of “necessarily rais[ing] a stated federal issue,” Grable 125 S.Ct. 2368. What Defendants bear the burden of showing here is (1) that the meaning of AWP in the Medicare statute is “actually disputed and substantial,” id., and (2) that this is the type of case that “a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities,” id. Any doubts will be resolved in favor of remand. Gaus, 980 F.2d at 566.

A. “Actually Disputed and Substantial”

Defendants are unable to meet their burden of showing that the meaning of the Medicare provisions at issue are either actually disputed or substantial enough to create federal jurisdiction. First, and most importantly, Defendants fail to show that determining the meaning of AWP is “substantial” under Grable and Merrell Dow. Defendants argue that because Medicare is “an entirely federal program,” the federal courts “have a special responsibility to entertain claims on behalf of Medicare beneficiaries.” (Defs.’ Mem. Opp. Mot. 17-

18.) Additionally, they argue, “inconsistent determinations of what AWP was understood to mean under the Medicare statute in these various cases could create collateral confusion and inconsistencies in the administration of federally supported Medicaid programs.” (Defs. Mem. Opp. Mot. 18-19.)

Defendants’ position receives some support from Judge Saris’ recent ruling in State of Arizona v. Abbot Laboratories, Inc., MDL No. 1456, Civ. No. 01-12257-PBS (D. Mass. Oct. 24, 2006). In State of Arizona, Judge Saris concluded that the meaning of AWP is substantial because (1) “[t]he government has a strong national interest in prohibiting fraud upon medicare beneficiaries because fraudulent acts threaten Medicare’s integrity”; (2) how AWP is interpreted will greatly effect the Medicare litigants in Arizona and also in other states; and, (3) determining the meaning of AWP “directly impacts the viability and effectiveness of the federal Medicare program.” MDL No. 1456, Civ. No. 01-12257-PBS, Slip Opinion at 8-9.

The State, however, contends that it cannot be the case that mere construction of a federal statute, by itself, is sufficient to create federal jurisdiction. If it were, the State argues, “then any time the interpretation of a federal statute arises in the context of a state law claim, federal jurisdiction would exist.” (Pl.’s Reply 5.) Moreover, the State argues, the issue is not substantial because AWP is

no longer the standard for reimbursement under Medicare.

The State prevails, Judge Saris' recent ruling notwithstanding. Just like the claims in Merrell Dow, these are state law tort claims that rest in part on a federal standard. This is a far different set of facts than in Grable, where the ability of the Internal Revenue Service to enforce the tax code through tax liens was at issue. Here, the resolution of the meaning of AWP will have little effect on the future viability of the Medicare program since the AWP standard has been abandoned. While it may well be the case that the meaning of AWP is a substantial issue for the parties, it is no longer a substantial issue for the federal government.

Moreover, while Congress's failure to create exclusive federal jurisdiction for cases involving improper notice in tax foreclosure actions might well be attributed to oversight, the same cannot be said for the failure to create exclusive federal jurisdiction for violations of the Medicare statute. In other words, if Congress had thought that AWP and other Medicare provisions implicated a substantial federal interest, it could have ensured that only federal courts would hear such cases. It did not.

Second, in addition to failing to show that the meaning of "AWP" is "substantial," Defendants also fail to show that the meaning of AWP is "actually

disputed.” Defendants argue that the meaning of AWP is disputed because “there is evidence that Congress understood that AWP did not represent the actual cost providers paid for the drugs” (Defs.’ Mem. Opp. 15.) However, they neither produce evidence to this effect, nor do they even articulate a possible alternative meaning for “average wholesale price.” While the meaning of AWP may be nominally disputed by Defendants, they have not shown that it is actually disputed.

This is the same conclusion reached, albeit for slightly different reasons, in Commonwealth of Pennsylvania v. Tap Pharmaceutical Products, Inc., 2005 U.S. Dist. LEXIS 19967 (E.D. Penn. 2005) (holding that “[t]he term ‘average wholesale price’ is not ‘actually disputed’ because the Commonwealth does not premise its claim on the construction of these words as they appear in the applicable Medicare statute and regulations) and Texas v. Abbot Laboratories., Inc., 2005 U.S. dist. LEXIS 42434 (W.D. Tex. 2005) (holding that “[i]t is clear that Plaintiffs do not premise their claims on the definition of the term ‘Medicare AWP’ . . . [and so] no court need ascribe any meaning to the term for either party to prevail). Defendants fail to meet their burden of showing that the State’s claim involves issues that are actually disputed or substantial enough for federal jurisdiction to exist, and so the case must be remanded.

B. Disturbing the Balance

Additionally, it may well be the case that taking cases such as this would “disturb the congressionally approved balance of federal and state judicial responsibilities,” Grable 125 S.Ct. 2368. Unlike in Grable, where very few foreclosure cases were likely to implicate a federal interest, here, as in Merrell Dow, a substantial number of state tort cases are likely to implicate a federal statute. This might disturb the congressionally approved balance and lead to the clogging of the federal courts.

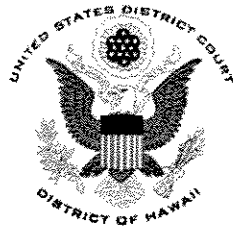
In fact, several courts addressing this precise issue have determined just that. See Wisconsin v. Abbott Laboratories, 390 F.Supp.2d 815 (W.D. Wis. 2005); Minnesota v. Pharmacia Corp., 2005 U.S. Dist. LEXIS 27638 (D. Minn. 2005). At least two courts, however, have found to the contrary. In one instance, the decision was distinguished from Wisconsin (and from Merrell Dow) on the grounds that a federal contract was involved. See Santa Clara v. Astra, USA, Inc., 401 F.Supp.2d 1022, 1030 (N.D. Cal. 2005) (“The instant case is also distinct: it involves a federal contract whereas none was at issue in Wisconsin. The instant case therefore has a higher quotient of federal interest. . . . [because this is] the type of task that already falls to federal courts.”) Here, as in Wisconsin and Minnesota, no federal contract is at issue.

The other case to the contrary is State of Arizona, MDL No. 1456, Civ. No. 01-12257-PBS, Slip Opinion at 9-11. There, Judge Saris found that “granting federal jurisdiction in the case does not open the door to a horde [of cases]: the horde has already stormed the door.” Id. While it may be that this particular horde has already stormed the door, the inquiry should rather focus on how many other hordes are gathered in wait on the horizon. Allowing federal jurisdiction here, where only a federal standard is implicated, would likely lead to many other cases in unrelated matters being regularly removed to federal court. Adjudication of this type of case could well disturb the congressionally approved balance between federal courts and state courts, providing an additional grounds for remand.

CONCLUSION

For the foregoing reasons, the Court FINDS and RECOMMENDS
that Plaintiff's Motion for Remand be GRANTED.

DATE: Honolulu, Hawaii, October 27, 2007



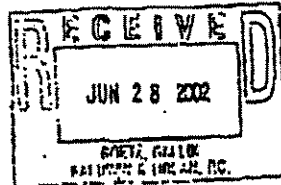
/s/ Barry M. Kurren
Barry M. Kurren
United States Magistrate Judge

State of Hawaii v. Abbot Labs., Inc.; AMENDED FINDING AND RECOMMENDATION
THAT PLAINTIFF'S MOTION FOR REMAND BE GRANTED; CV No. 06-00437 DAE-
BMK.

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BY ~~SALE 1. JEFFREY D. CAMP~~
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

THE STATE OF MONTANA, ex rel.)
MIKE McGRATH, Attorney)
General,)

CV 02-09-H-DWM

Plaintiff,)

-vs-)

ORDER

 ABBOTT LABORATORIES, INC,)
 AMERICAN HOME PRODUCTS)
 CORPORATION; ANGEN INC.,)
 ASTRAZENCA; AVENTIS PHARMA;)
 CHIRON; BAXTER PHARMACEUTICAL)
 PRODUCTS, INC.; BRISTO-MYERS)
 SQUIBB COMPANY; DEY, INC.;)
 SMITHKLINE BEECHAM CORPORATION)
 d/b/a GLAXOSMITHKLINE)
 CORPORATION; PHARMACIA)
 CORPORATION; HOECHST MARION)
 RUSSSEL, INC.; IMMUNEX)
 CORPORATION; ELI LILLY AND)
 COMPANY; SCHERING-PLOUGH)
 CORP.; PHARMACIA & UPJOHN)
 COMPANY; SMITHKLINE BEECHAM)
 CORPORATION; WARRICK)
 PHARMACEUTICALS CORPORATION;)
 AND DOES 1-100; DOES 101-125,)
 DOES 126-150; DOES 151-200,)

Defendants.)

This action was originally filed in the Montana First
Judicial District in Lewis and Clark County, Montana. Defendants

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removed it to federal court, from which it was conditionally transferred by the Judicial Panel on Multidistrict Litigation ("Panel") to the District of Massachusetts pursuant to the Panel's order governing transfer of all cases involving claims that pharmaceutical corporations inflated the average wholesale price of Medicare covered prescription drugs. In re Immune Corporation Average Wholesale Price Litigation, ___ F. Supp. ___, 2002 W.L. 857692 (Jud. Pan. Mult. Lit. 2002).

Plaintiff has filed a motion to remand the action to state court. Defendants Smithkline Beecham Corporation d/b/a Glaxosmithkline, Pharmacia Corporation and Pharmacia & Upjohn Company ask the Court to stay consideration of the motion to remand pending a decision in the MDL proceedings. The other Defendants join in the motion.

A pending transfer order does not limit the Court's authority to rule on the motion to remand. McCravy v. Bayer Corporation, 2002 WL 1308588 (E.D.La. 2002). Whether to grant a stay is within the Court's discretion. *Id.* In deciding whether to rule, district courts should take into account whether the motion to remand involves issues unique to the action or whether it raises issues likely to arise in other actions in the transferee district should transfer be ordered.

In addition to judicial efficiency, a key purpose of consolidating cases before the Panel is to promote consistent

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rulings on pretrial matters. In this case, the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay. Therefore, a stay pending the Panel's final decision on transfer is the best course of action.

Accordingly, IT IS HEREBY ORDERED Defendants' Motions to Stay (dkt. #57, dkt #64) are GRANTED.

IT IS FURTHER ORDERED that consideration of Plaintiffs' Motion to Remand (dkt # 45) is STAYED pending the Panel's final ruling on transfer.

DATED this 21st day of June, 2002.



Donald W. Molloy, Chief Judge
United States District Court



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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CV-N-02-202-ECR (RAM)

vs.

MINUTES OF COURT

AMERICAN HOME PRODUCTS CORPORATION,
et al.,

Date: July 23, 2002

Defendants.

THE STATE OF NEVADA,

Plaintiff,

CV-N-02-80-ECR (RAM)

vs.

ABBOTT LABORATORIES, INC., et al.,

Defendants.

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LANCE S. VALLIS
CLERK

PRESENT: EDWARD C. REED, JR., SENIOR U. S. DISTRICT JUDGE

Deputy Clerk: Colleen Larsen; Reporter: Cathy Worken

Counsel for Plaintiffs: Steve Berman; Sean Matt; David Wasick
L. Timothy Terry

Counsel for Defendants: Steve Hudspeth; J. Thomas Susich;
Robert Hubbell; Matthew Larabee; J. Jorgensen; Joseph Young;
Clark Vallis; Kimberley Harris; Bruce Laxalt; Ellen Winograd; D.
Scott Wise; Paul Schleifman; Alice Campos-Mercado; Rex Goodenow;
Bruce Beasley; David Burman; Patrick Byrne; Marshall Smith;
Ron Castle; Vonn Jenkins; Leigh Goddard; Patricia Halstead;
Kimberly Dunne; Gavin Jangard; Patrick Byrne; Chris Jorgensen
Rick Hau; Carla Wade;

MINUTES OF HEARING MOTION FOR TEMPORARY STAY (#25), MOTION TO
REMAND (#30) (in CV-N-02-202-ECR), and MOTION FOR REMAND (#18),
MOTION TO STAY (#74), (in CV-N-02-80-ECR):

At 10:16 A. M. Court convenes; counsel Matthew Rossi is present via
telephone conference.

81

Case 1:06-cv-00437-DAE-BMK Document 14 Filed 08/31/2006 Page 3 of 24

07/30/2002 08:22 FAX 212 450 5988
Jul-29-02 03:15PM Firm-LAXALT & NORMAN, LTD.

DPW 30-51

4753224783

1-212 7.27/02 P-225

2002

CV-N-02-202-ECR
CV-N-02-80-ECR
Page Two

Argument is presented by plaintiffs' counsel Berman in support of the motions to remand (#30 & 19), and motions to stay (#25 & 74).

At 11:15 A. M. Court recesses.

At 11:15 A. M. Court reconvenes.

Responsive argument is presented by defense counsel Larrabee.

At 12:12 P. M. Court recesses.

At 1:37 P. M. Court reconvenes; Matthew Rossi is present via telephone conference.

IT IS ORDERED that the motion to supplement the record, filed July 18, 2002, by defendant Astrazeneca, is GRANTED.

Continued responsive arguments by defense counsel Larrabee, Wise, and Hudspeth; reply by plaintiffs' counsel Berman.

At 3:00 P. M. Court recesses.

At 3:22 P. M. Court reconvenes.

Reply presented by plaintiffs' counsel Matt.

Further comments by counsel Larrabee, and Hudspeth.

At 3:42 P. M. Matter stands submitted; the Court will announce its decision from the Bench on Friday, July 26, 2002, at 1:30 P. M.

LANCE S. WILSON, CLERK


Deputy

07/30/2002 08:22 FAX 512 450 5886
JUL-26-02 04:12am From: LAXAL, L & NOMURA, LTD.

DPK 30-51

4753224783

1-282 P.02

P-227 0003

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE EDWARD C. REED, JR., DISTRICT JUDGE
4

5 ---000---

6 STATE OF NEVADA,

7 PLAINTIFF,
8

NO. CV-N-02-202-ECR(RAM)

JULY 26, 2002

9 -VS-

RENO, NEVADA

10 AMERICAN HOME PRODUCTS, INC.,
11 ET AL.,

12 DEFENDANTS.
13

STATE OF NEVADA,

14 PLAINTIFF,
15

NO. CV-N-02-80-ECR(RAM)

16 -VS-

17 ABBOTT LABORATORIES, INC.,
18 ET AL.,

19 DEFENDANTS.
20

21 DECISION OF THE COURT

22 APPEARANCES:

23 FOR THE PLAINTIFF:

L. TIMOTHY TERRY, ESQUIRE

24 BY TELEPHONE:

DAVID WASICK, ESQUIRE

SEAN MATT, ESQUIRE

25 FOR THE DEFENDANTS:

IMMUNEX CORPORATION

BRUCE STEENLEY, ESQUIRE

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 05:22 FAX 212 450 5985

DPW 30-51

JUL-25-02 04:12 PM FROM: LAXAL7 & HODURA, LTD.

ATTORNEYS

T-125 P.85

F-121

2006

1	DEY, INC.	J. THOMAS SUSICE, ESQUIRE
2	ASTRAZENECA	ELLEN WINOGRAD, ESQUIRE
3	BY TELEPHONE:	
4	FOR THE DEFENDANTS:	
5	GLAXOSMITHKLINE	ROBERT HUBBELL, ESQUIRE
6	ASTRAZENECA	MATTHEW LARRABER, ESQUIRE
7	BAXTER	KIM HARRIS, ESQUIRE
8	CHIRON CORPORATION	ERIC GALL, ESQUIRE
9	SCHERING-PLOUGH	MATTHEW ROSSI, ESQUIRE
10	BRISTOL-MYERS SQUIB	RONALD L. CASTLE, ESQUIRE
11	ELI LILLY COMPANY	DAVID POTTER, ESQUIRE
12	BAYER CORPORATION	LYNDON TREYTER, ESQUIRE
13	ABBOTT LABORATORIES	LEE GODDARD, ESQUIRE
14	TAP PHARMACEUTICALS	WILLIAM DAVIS, ESQUIRE
15	DEY, INC.	KIMBERLY DUNN, ESQUIRE
16	AMERICAN HOME PRODUCTS	CHRISTOPHER COOK, ESQUIRE
17	ANGEN	BOB JENKINS, ESQUIRE
18		LEE ANN RUSSO, ESQUIRE
19		LISA LEWIS, ESQUIRE
20		CRAIG HOLDEN, ESQUIRE
21		DAVID FRANCIS, ESQUIRE
22	REPORTED BY:	JOSEPH YOUNG, ESQUIRE
23		CATHY M. WORKEN, CCR, RPR
24		OFFICIAL COURT REPORTER
25		400 SOUTH VIRGINIA STREET
		RENO, NEVADA 89502
		(775) 324-6777
		COMPUTER-ASSISTED TRANSCRIPTION

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

EXHIBIT 4

Case 1:06-cv-00437-DAE-BMK Document 14 Filed 08/31/2006 Page 2 of 24

07/30/2002 08:21 FAX 222 430 5888

JUL-29-02 08:16PM FIRM-LAXALT & NOMURA, LTD.

DPW 30-51

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F-222 F.05/01 F-222

2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CV-N-02-202-ECR (RAM)

vs.

MINUTES OF COURT

AMERICAN HOME PRODUCTS CORPORATION,
et al.,

Date: July 23, 2002

Defendants.

THE STATE OF NEVADA,

Plaintiff,

CV-N-02-80-ECR (RAM)

vs.

ABBOTT LABORATORIES, INC., et al.,

Defendants.

FILED
2002 JUL 24 AM 9:15
LAWRENCE, VALLIN
CLERK

PRESENT: EDWARD C. REED, JR., SENIOR U. S. DISTRICT JUDGE

Deputy Clerk: Colleen Larsen; Reporter: Cathy Worken

Counsel for Plaintiffs: Steve Berman; Sean Matt; David Wasick
L. Timothy Terry

Counsel for Defendants: Steve Rudspeth; J. Thomas Susich;
Robert Hubbell; Matthew Larrabee; J. Jorgensen; Joseph Young;
Clark Vellis; Kimberley Harris; Bruce Laxalt; Ellen Winograd; D.
Scott Wise; Paul Schleifman; Alice Campos-Mercado; Rex Goodenow;
Bruce Beasley; David Durman; Patrick Byrne; Marshall Smith;
Ron Castle; Vonn Jenkins; Leigh Goddard; Patricia Halstead;
Kimberly Dumme; Gavin Jangard; Patrick Byrne; Chris Jorgensen
Rick Hau; Carla Wade;

MINUTES OF HEARING MOTION FOR TEMPORARY STAY (#25), MOTION TO
REMAND (#30) (in CV-N-02-202-ECR), and MOTION FOR REMAND (#19),
MOTION TO STAY (#74), (in CV-N-02-80-ECR):

At 10:16 A. M. COURT CONVENES; counsel Matthew Rossi is present via
telephone conference.

41

Case 1:06-cv-00437-DAE-BMK Document 14 Filed 08/31/2006 Page 3 of 24

07/30/2002 08:22 FAX 312 450 5988
Jul-29-02 23:16PM Firm-LAXALT & NOMURA, LTD.

DPW 30-51

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1-212 9.57/05 P-225

DOC3

CV-N-02-202-ECR
CV-N-02-80-ECR
Page Two

Argument is presented by plaintiffs' counsel Berman in support of the motions to remand (#30 & 19), and motions to stay (#25 & 74).

At 11:15 A. M. Court recesses.

At 11:15 A. M. Court reconvenes.

Responsive argument is presented by defense counsel Larrabee.

At 12:12 P. M. Court recesses.

At 1:37 P. M. Court reconvenes; Matthew Rossi is present via telephone conference.

IT IS ORDERED that the motion to supplement the record, filed July 18, 2002, by defendant Astrazeneca, is GRANTED.

Continued responsive arguments by defense counsel Larrabee, Wise, and Hudspeth; reply by plaintiffs' counsel Berman.

At 3:00 P. M. Court recesses.

At 3:22 P. M. Court reconvenes.

Reply presented by plaintiffs' counsel Matt.

Further comments by counsel Larrabee, and Hudspeth.

At 3:43 P. M. Matter stands submitted; the Court will announce its decision from the Bench on Friday, July 26, 2002, at 1:30 P. M.

LANCE S. WILSON, CLERK


Lance S. Wilson
Deputy

07/30/2002 08:22 FAX 712 450 5855
JUL-26-02 04:12PM FIVE-LAXAL & MONERA, LTD.

DPW 30-51

4753224783

1-280 P.02

P-227

0003

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE EDWARD C. REED, JR., DISTRICT JUDGE
4
5

---000---

6 STATE OF NEVADA,

7 PLAINTIFF,

8 -VS-

9 AMERICAN HOME PRODUCTS, INC.,
10 ET AL.,

11 DEFENDANTS.
12

13 STATE OF NEVADA,

14 PLAINTIFF,

15 -VS-

16 ABBOTT LABORATORIES, INC.,
17 ET AL.,

18 DEFENDANTS.
19

NO. CV-N-02-202-ECR(RAM)

JULY 26, 2002

RENO, NEVADA

NO. CV-N-02-80-ECR(RAM)

20 DECISION OF THE COURT

21 APPEARANCES:

22 FOR THE PLAINTIFF:

23 BY TELEPHONE:

24 FOR THE DEFENDANTS:

25 IMCINEX CORPORATION

L. TIMOTHY TERRY, ESQUIRE

DAVID WASICK, ESQUIRE

SEAN MATT, ESQUIRE

BRUCE BEESLEY, ESQUIRE

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:22 FAX 312 450 5965

DPW 30-51

JW-21-02 04:12pm From: LAMAR & MUMFORD

+7732224782

T-126 P.05

2006
F-217

1	DEV, INC.	J. THOMAS SUSICE, ESQUIRE
2	ASTRAZENECA	ELLEN WINOGRAD, ESQUIRE
3	BY TELEPHONE:	
4	FOR THE DEFENDANTS:	
5	GLAXOSMITHKLINE	ROBERT HUBBELL, ESQUIRE MATTHEW LARRABER, ESQUIRE
6	ASTRAZENECA	KIM HARRIS, ESQUIRE ERIC GAYL, ESQUIRE
7	BAXTER	MATTHEW ROSSI, ESQUIRE
8	CHIRON CORPORATION	RONALD L. CASTLE, ESQUIRE
9	SCHERING-PLOUGH	DAVID POTTER, ESQUIRE
10	BRISTOL-MYERS SQUIB	LYNDON TRETTER, ESQUIRE LEE GODDARD, ESQUIRE
11		
12	ELI LILLY COMPANY	WILLIAM DAVIS, ESQUIRE
13	BAYER CORPORATION	KIMBERLY DUNN, ESQUIRE
14	ABBOTT LABORATORIES	CHRISTOPHER COOK, ESQUIRE BOB JENKINS, ESQUIRE
15		
16	TAP PHARMACEUTICALS	LEE ANN RUSSO, ESQUIRE
17	DEV, INC.	LISA LEWIS, ESQUIRE
18	AMERICAN HOME PRODUCTS	CRAIG HOLDEN, ESQUIRE DAVID FRANCIS, ESQUIRE
19	AMGEN	JOSEPH YOUNG, ESQUIRE
20		
21		
22	REPORTED BY:	CATHY M. WORKEN, CCR, RPR OFFICIAL COURT REPORTER 400 SOUTH VIRGINIA STREET RENO, NEVADA 89501 (775) 324-6777
23		
24		
25	COMPUTER-ASSISTED TRANSCRIPTION	

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:22 FAX 212 450 5884

DPW 30-51

101-20-62 04:13pm From: JAXALY & KUMAR, LTD.

47753224781

T-206 P.04

Q 005
P-227

1 RENO, NEVADA, FRIDAY, JULY 26, 2002, 1:30 P.M.

2 ---000---

3 THE COURT: MS. CLERK, DO YOU HAVE SOME OF
4 THE ATTORNEYS ON THE TELEPHONE?

5 THE CLERK: YES, YOUR HONOR.

6 THERE ARE SEVERAL ATTORNEYS ON THE TELEPHONE, I
7 WOULD ASK COUNSEL ON THE TELEPHONE PLEASE STATE YOUR
8 APPEARANCES.

9 MR. HATT: SEAN HATT, LAW FIRM OF HAGENS
10 BERGMAN, SEATTLE, SPECIAL COUNSEL TO THE STATE OF NEVADA.
11 GOOD AFTERNOON, YOUR HONOR.

12 MR. HUBBELL: THIS IS ROBERT HUBBELL, HELLER,
13 EHRMAN, WHITE & McAULIFFE, FOR GLAXCOSMITHKLINE.

14 MS. HARRIS: THIS IS KIM HARRIS FROM DAVIS,
15 POLK & WARDELL FOR ASTRAZENeca PHARMACEUTICALS.

16 MR. ROSSI: THIS IS MATT ROSSI FROM AKIN,
17 GUMP, STRAUSS, HAUER & FELD, FOR DEFENDANT BAXTER.

18 MR. CASTLE: RONALD L. CASTLE, ARENT, FOX,
19 KINTNER, FLOTKIN & KAEN, FOR CEIRON CORPORATION.

20 MR. POTTER: THIS IS DAVID POTTER, ROPES AND
21 GRAVES FOR SCHERING-PLOUGH.

22 MR. TRETTER: LYNDON TRETTER OF HOGAN &
23 HARTSON FOR BRISTOL-MYERS SQUIBB.

24 MR. DAVIS: WILLIAM DAVIS FOR ELY LILLY &
25 COMPANY.

CATEY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:22 FAX 212 450 5868

DPW 30-31

Jul-25-02 04:13pm From: LAXALT & MORRIS, LTD.

47762234783

1-258 P.05/00 P-127

2006

4

1 MS. DUNN: KIMBERLY DUNN OF REALTA (PHON),
2 BROWN & WOOD FOR HAYER CORPORATION.
3 MS. GODDARD: LEE GODDARD FROM McDONALD
4 CARANO ALSO FOR BRISTOL-MYERS SQUIBB.
5 MR. COOK: CHRISTOPHER COOK FROM JONES DAY
6 FOR ABBOTT LABORATORIES.
7 MS. RUSSO: LEE ANN RUSSO FROM JONES DAY FOR
8 TAP PHARMACEUTICALS PRODUCTS, INC.
9 MS. LEWIS: LISA LEWIS FROM COUDERT BROTHERS
10 FOR DEY, INC.
11 MR. HOLDEN: CRAIG HOLDEN FROM OBERT TAYLOR
12 FOR AMERICAN HOME PRODUCTS.
13 MR. FRANCIS: DAVID FRANCIS, LAS VEGAS
14 COUNSEL FOR AMERICAN HOME PRODUCTS.
15 MR. GAILL: ERIC GAILL FROM DAVIS POLK ALSO
16 FOR ASTRAZENCA.
17 MR. YOUNG: JOSEPH YOUNG, HOGAN & HARTSON FOR
18 AMGEN.
19 MR. LARRABEE: GOOD AFTERNOON, YOUR HONOR,
20 MATTHEW LARRABEE FROM KELLER HERMAN FOR GLAXOSMITHKLINE.
21 MR. JENKINS: BOB JENKINS FROM BURTON,
22 BARTLETT & GLOGOVAC FOR ABBOTT LABORATORIES AND CAPT
23 HOLDINGS, INC.
24 THE COURT: IS THAT THE FULL ROLL CALL,
25 MS. CLERK?

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:23 FAX 212 450 5988

DPW 30-51

JUL-22-02 04:19PM Firm-LAXALT & NOLAN, LTD.

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7-266 P.04/02 P-225

007

5

1 THE CLERK: THAT SOUNDS LIKE THAT'S IT, YOUR
2 HONOR.

3 THE COURT: I'M ASSUMING THAT ALL OF YOU CAN
4 HEAR ME.

5 THE COURT AT THIS TIME IS PREPARED TO ANNOUNCE ITS
6 DECISION.

7 I DIDN'T TAKE THE ROLL OF THE MANY ATTORNEYS WHO
8 ARE IN THE COURTROOM, I INDICATED PREVIOUSLY IT DIDN'T MAKE
9 ANY DIFFERENCE WHETHER YOU WERE HERE OR NOT OR WERE HERE BY
10 TELEPHONE, THAT'S NOT GOING TO AFFECT THE DECISION IN ANY
11 WAY, AND THERE ARE ATTORNEYS ON BOTH SIDES HERE PRESENT IN
12 THE COURTROOM.

13 WE ARE AT THIS TIME PREPARED TO ANNOUNCE OUR
14 DECISION ON THE PENDING MOTIONS NOW BEFORE THE COURT.

15 THESE CASES INVOLVE THE STATE OF NEVADA VERSUS
16 ABBOTT LABORATORIES AND NUMEROUS OTHER DEFENDANTS, THAT'S
17 CASE NUMBER CV-N-02-0080.

18 I WILL BE REFERRING TO THAT CASE AS THE ABBOTT
19 CASE.

20 THE SECOND CASE INVOLVES STATE OF NEVADA VERSUS
21 AMERICAN HOME PRODUCTS AND NUMEROUS OTHER DEFENDANTS, AND
22 THAT CASE IS NUMBER 02 -- THAT'S CV-N-02--202.

23 I'LL BE REFERRING TO THAT CASE AS THE AMERICAN HOME
24 CASE.

25 ARGUMENTS WERE PRESENTED TO THE COURT ON JULY 25 IN

CATEY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 06:23 FAX 212 450 5988
Jul-28-02 04:13pm From: LAXALT & KONRAD, L.P.C.

DPW 30-51

ATTORNEYS

7-124 P. 07/20 P-127

6

1 RESPECT TO THESE MOTIONS.

2 THE MOTIONS ARE IN THE ABBOTT CASE DOCKET NUMBER 88
3 TO RECONSIDER OUR PREVIOUSLY ENTERED STAY ORDER, DOCKET
4 NUMBER 79.

5 WE ALSO HEARD ARGUMENTS IN THE ABBOTT CASE ON THE
6 MOTION TO REMAND, WHICH IS DOCKET NUMBER 19.

7 IN THE AMERICAN HOME CASE WE HEARD ARGUMENTS ON
8 MOTION TO STAY, DOCKET NUMBER 25, AND A MOTION TO REMAND,
9 DOCKET NUMBER 30. ALL.

10 MOTIONS IN BOTH CASES WERE FULLY BRIEFED AND THE
11 COURT CONSIDERED ALL THE PAPERS ON FILE, AS WELL AS THE ORAL
12 ARGUMENTS.

13 THE ORAL ARGUMENTS, AS I COMMENTED AT THE END OF
14 THE ARGUMENTS WERE OUTSTANDING. IT ISN'T EVERYDAY IN THIS
15 COURT THAT WE HEAR WELL PREPARED, WELL PRESENTED ARGUMENT
16 SUCH AS WE HEARD ON JULY 23RD. IT'S A TREAT FOR THE COURT TO
17 HAVE THE FINE LAWYERS WHO ARE IN THIS CASE ON BOTH SIDES.

18 THE ARGUMENTS WERE VERY USEFUL. THEY HELPED US TO
19 UNDERSTAND SOME THINGS THAT WE'RE NOT QUITE SO FAMILIAR WITH,
20 PARTICULARLY WHERE AN MDL STAY MAY BE APPROPRIATE, AND THE
21 MEDICARE AND MEDICAID PROGRAMS.

22 WE FREQUENTLY FUMG INTO MDL, BUT I THINK THIS CASE
23 HAS TAUGHT US QUITE A BIT ABOUT MDL THAT WE DID NOT
24 UNDERSTAND BEFORE.

25 THESE CASES PRESENT A DIFFICULT DILEMMA WHICH

CATRY M. WORKEN, OFFICIAL REPORTER. (775) 324-5777

Case 1:06-cv-00437-DAE-BMK Document 14 Filed 08/31/2006 Page 10 of 24

07/30/2002 08:23 FAX 212 450 5885

DPF 30-81

Jul-29-02 04:14pm From: JALAT & KAMARA, LTD.

4775224783

1-166 P.01/20 P-227

2008

7

1 REQUIRES US TO BALANCE TWO COMPETING ASPECTS OF THE FEDERAL
2 COURT SYSTEM.

3 ON THE ONE HAND WE ARE CALLED TO EXAMINE OUR
4 JURISDICTION OVER THIS CASE. THIS IS AN INQUIRY THAT HAS
5 BEEN REFERRED TO AS A FIRST AND FUNDAMENTAL QUESTION FOR A
6 COURT, CITING STEEL COMPANY VERSUS CITIZENS FOR A BETTER
7 ENVIRONMENT, 523 U.S. 83, AT 94, AND AT 101-2, 1998.

8 THE STATE HAS MADE A STRONG AND PERSUASIVE
9 ARGUMENT, PUTTING FORTH THIS AS A FIRST CONSIDERATION FOR US.

10 ON THE OTHER HAND, WE ARE FACED WITH THE FACT THAT
11 THIS CASE EXISTS WITHIN THE REALM OF MULTIDISTRICT
12 LITIGATION, WHICH I WILL REFER TO GENERALLY AS MDL.

13 MDL PLACES GREAT EMPHASIS ON CONSISTENCY OF
14 DECISIONS, CONSERVATION OF JUDICIAL RESOURCES, AND EFFICIENCY
15 OF THE COURT PROCESS.

16 THE COURT VIEWS THIS SITUATION SOMEWHAT LIKE THE
17 PROVERBIAL CHICKEN AND EGG QUESTION.

18 IF PENDING BEFORE US WERE ONLY A SIMPLE NON-COMPLEX
19 MOTION INVOLVING JURISDICTION, WE WOULD HAVE LITTLE TROUBLE
20 DETERMINING HOW TO PROCEED.

21 IF THERE WERE NO COMPLEX OR DIFFICULT
22 JURISDICTIONAL PROBLEM OUR DECISION ON A STAY WOULD BE MUCH
23 EASIER.

24 IT IS THE INTERSECTION OF THESE TWO IMPORTANT
25 CONSIDERATIONS THAT CAUSES THE DIFFICULTY IN ANALYSIS OF THIS

CATHY M. WORREX, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:23 FAX 212 450 5888

DPF 30-51

JUL-26-02 04:14pm FIRM-LAXALT & BOMBA, LTD.

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1-215 F.08/20 F-217

0010

8

1 CASE.

2 THE PRINCIPAL PURPOSE OF MDL IS TO ENSURE THAT
3 MULTIPLE CASES AROUND THE COUNTRY OF NATIONAL IMPORTANCE
4 WHICH RAISE SIMILAR ISSUES MAY BE DECIDED IN A CONSISTENT AND
5 EFFICIENT MANNER.

6 IN DETERMINING WHETHER TO STAY THESE CASES PENDING
7 THE MDL DECISION ON TRANSFER, WE CONSIDER THE FOLLOWING
8 FACTORS WHICH APPEAR TO BE SPECIFIC TO MDL CONSIDERATION:

9 ONE, CONSISTENCY OF JUDICIAL OUTCOME.

10 TWO, EFFICIENT RESOLUTION OF THE ISSUES.

11 THREE, JUDICIAL ECONOMY.

12 FOUR, CONVENIENCE OF THE PARTIES AND WITNESSES.

13 FIVE, THE COMPLEXITY OF THE JURISDICTIONAL ISSUES.

14 AND SIX, THE SUFFICIENT LIKELIHOOD THAT THE ISSUES
15 WILL ARISE IN MDL.

16 SEE FOR EXAMPLE, KOHL, K-O-H-L, VERSUS AMERICAN
17 HOME PRODUCTS CORP. 78 FED. SUPP. 2d 885, WESTERN DISTRICT OF
18 ARKANSAS, 1999.

19 STATING THAT THE COURT CONSIDERS "WHETHER THE
20 ISSUES ARE EASILY CAPABLE OF ARISING IN MULTIPLE CASES,
21 WHETHER THE ISSUES INVOLVE QUESTIONS OF LAW IN FACT WHICH
22 RELATE TO THE CASES ALREADY TRANSFERRED TO MDL, AND WHETHER
23 IT WOULD SERVE JUDICIAL ECONOMY TO HAVE THE QUESTIONS
24 RESOLVED BY A SINGLE COURT:

25 THESE FACTORS WE HAVE LISTED ARE DRAWN FROM

CATEY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:24 FAX 212 450 5988

DPW 30-21

Jvl-23-02 84:16pm From-LAXALT & NOMRA, LTD.

473521473

7-286 P.18/23 1-227

011

9

1 NUMEROUS CASES HOWEVER, THESE ARE CASES WHICH HAVE CONSIDERED
2 STAYS PENDING POSSIBLE TRANSFER TO A MULTIDISTRICT COURT.

3 IN OUR ANALYSIS WE ALSO CONSIDER THE FOLLOWING
4 FACTORS APPLICABLE IN GENERAL TO CONSIDERATION OF STAY
5 MOTIONS:

6 ONE, THE POTENTIAL PREJUDICE TO THE NON-MOVING
7 PARTY.

8 TWO, THE HARDSHIP AND INEQUITY TO THE MOVING PARTY
9 IF THE ACTION IS NOT STAYED.

10 AND THREE, THE JUDICIAL RESOURCES THAT WOULD BE
11 SAVED BY AVOIDING DUPLICATIVE LITIGATION.

12 A DISTRICT COURT HAS THE INHERENT POWER TO STAY ITS
13 PROCEEDINGS, RIVERS VERSUS WALT DISNEY COMPANY, 980 FED.
14 SUPP. 1358, AT 1360, CENTRAL DISTRICT, 1997.

15 THIS POWER IS INCIDENTAL TO THE POWER INHERENT IN
16 EVERY COURT TO CONTROL THE DISPOSITION OF THE CAUSES ON ITS
17 DOCKET, CITING LANDIS VERSUS NORTH AMERICAN COMPANY, 299 U.S.
18 248 AT 254, 1935.

19 THE POWER TO STAY IS NOT ELIMINATED BY A PENDING
20 MOTION TO TRANSFER BEFORE A MULTIDISTRICT LITIGATION PANEL.

21 THE RULES OF PROCEDURE OF THE JUDICIAL PANEL ON
22 MULTIDISTRICT LITIGATION, RULE 1.5, CITING SMITH VERSUS MALT
23 BOXES ETC. U.S.A. INCORPORATED, 191 FED. SUPP. 2d 1155, AT
24 1157, EASTERN DISTRICT OF CALIFORNIA, 2002, RIVERS, 980 FED.
25 SUPP. AT 1360.

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:24 FAX 212 450 5866

DPW JO-E1

Jul-29-02 04:14PM From: LAXALT & NIMMO, LTD.

+1753224733

7-288 7.11.02 P-227

2012

10

1 WE HAVE EXAMINED MANY CASES WHICH SEEM TO INDICATE
2 THAT JURISDICTIONAL ISSUES SHOULD BE RESOLVED FIRST.

3 SEE FOR EXAMPLE, SHERWOOD VERSUS MICROSOFT, 91 FED.
4 SUPP. 3d 1196, MIDDLE DISTRICT OF TENNESSEE, 2000.

5 TORTOLA RESTAURANTS, L.P. VERSUS KIMBERLY-CLARK
6 CORPORATION, 987 FED. SUPP. 1185, NORTHERN DISTRICT OF
7 CALIFORNIA, 1997.

8 ARTNA VERSUS HOECHST, THAT'S H-O-E-C-H-S-T, I'M NOT
9 GOING TO TRY TO PRONOUNCE THE SECOND NAME, I'LL SPELL IT,
10 A-K-T-I-E-N-G-E-S-E-L-L-S-C-H-A-F-T, 54 FED. SUPP. 2d 1042,
11 DISTRICT OF KANSAS, 1999.

12 FARKAS VERSUS BRIDGESTONE/FIRESTONE, INCORPORATED,
13 113 FED. SUPP. 2d 1107, WESTERN DISTRICT OF KENTUCKY, 2000.

14 SMITH VERSUS MAIL BOXES, ETC., 1991, FED. SUPP. 2d
15 1155, 1157, EASTERN DISTRICT OF CALIFORNIA, 2002.

16 THAT LATTER CASE COLLECTS CASES WHERE
17 JURISDICTIONAL ISSUES WERE ADDRESSED BEFORE ANY MOTIONS TO
18 STAY.

19 WE HAVE ALSO EXAMINED MANY CASES THAT INDICATE THAT
20 JURISDICTION SHOULD BE DETERMINED IN THESE CIRCUMSTANCES IN
21 THE MULTIDISTRICT COURT, SEE FOR EXAMPLE, WEINKE VERSUS
22 MICROSOFT, 84 FED. SUPP. 2d 989, EASTERN DISTRICT OF
23 WISCONSIN, 2000, STATING THAT BECAUSE MULTIPLE ACTIONS WERE
24 COMMENCED AND PENDING TRANSFER TO MDL WITH THE SAME ISSUES AS
25 THE PRESENT CASE THE COURT WOULD STAY PENDING TRANSFER IN THE

CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

07/30/2002 08:34 FAX 212 450 5983

DPW 38-61

Jul-29-01 04:15pm From: LAXAL & NOMURA LTD.

+7733234783

T-211 P.12/21 P-217 2013

11

1 INTEREST OF JUDICIAL ECONOMY AND TO AVOID INCONSISTENT
2 RESULTS.

3 INT V. DIAMOND SHAMROCK CHEMICALS COMPANY, 901 F.2d
4 7, SECOND CIRCUIT, 1990.

5 MEDICAL SOCIETY OF STATE OF NEW YORK VERSUS
6 CONNECTICUT GENERAL CORPORATION, 187 FED. SUPP. 2d 89,
7 SOUTHERN DISTRICT OF NEW YORK, 2001.

8 RIVERS VERSUS WALT DISNEY COMPANY, 980 FED. SUPP.
9 1358, CENTRAL DISTRICT OF CALIFORNIA, 1997.

10 GOOD VERSUS PRUDENTIAL INSURANCE COMPANY OF
11 AMERICA, 5 FED. SUPP. 2d 804, NORTHERN DISTRICT OF
12 CALIFORNIA, 1998.

13 PORTNOY VERSUS LENITE LAB, 1987, WL 10236, DISTRICT
14 OF COLUMBIA, WHICH STAYED CASES FOR PURPOSES OF COORDINATION
15 OF RELATED CASES AND BECAUSE OF MINIMAL DELAY.

16 HAVING SAID THAT, WE NEXT CONSIDER WHETHER THE
17 ISSUES PRESENTED HERE WOULD LIKELY ARISE IN MDL.

18 IF THE ISSUES HERE ARE UNIQUE ONLY TO THIS CASE,
19 THIS FACTOR WOULD WEIGH STRONGLY IN FAVOR OF DENYING A STAY
20 AND PROCEEDING TO DECIDE THE JURISDICTIONAL QUESTION.

21 THERE DOES NOT SEEM TO BE ANY REAL DEBATE THAT THE
22 UNDERLYING FACTUAL ALLEGATIONS CONCERNING THE ALLEGED
23 MANIPULATIONS OF THE AVERAGE WHOLESALE PRICE AND MEDICAID
24 BEST PRICES ARE LIKELY TO, AND IN FACT HAVE ARISEN IN THE
25 CASES CURRENTLY CONSOLIDATED BEFORE JUDGE SARIS WHO PRESIDES

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07/30/2006 08:24 FAX 212 450 5886

DPW 30-51

JUL-25-02 04:21PM From: LALAT & NOMURA, LTD.

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7-286 P.12/21 P-227

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12

1 OVER THE POTENTIAL MCL TRANSFEREE COURT.

2 THE DEBATE SEEMS TO BE OVER WHETHER THE SPECIFIC
3 JURISDICTIONAL QUESTIONS HERE WILL BE PRESENTED TO JUDGE
4 SARIS.

5 WITH RESPECT TO AMERICAN HOME WE CONCLUDE THAT THE
6 QUESTION OF WHETHER THE CLAIMS MADE HERE ARISE UNDER FEDERAL
7 LAW IS LIKELY TO BE BEFORE JUDGE SARIS IN CONNECTION WITH
8 CASES PENDING BEFORE THE MCL COURT.

9 JUDGE MALLOY IN MONTANA RECENTLY STAYED A VERY
10 SIMILAR CASE IN MONTANA PENDING POSSIBLE TRANSFER TO MCL.

11 THE ORAL ARGUMENTS BROUGHT OUT THE FACT THAT A
12 SIMILAR CASE TO THE MONTANA AND NEVADA CASES HAS BEEN FILED
13 IN MINNESOTA.

14 THE MORE DIFFICULT ISSUE IS WHETHER THE QUESTION OF
15 SEPARATE AND INDEPENDENT CLAIMS WILL ARISE BEFORE JUDGE
16 SARIS.

17 THERE MAY WELL BE A QUESTION AS TO THIS PARTICULAR
18 ISSUE.

19 AS POINTED OUT DURING THE HEARINGS, THE COMBINATION
20 OF ONE FEDERAL CLAIM PLUS MULTIPLE NONREMOVABLE CLAIMS, PLUS
21 FAILURE OF ALL PARTIES TO JOIN IN THE REMOVAL IS NOT A COMMON
22 SITUATION TO BE FOUND IN THIS COURT.

23 SECTION 1442(c) WAS INVOKED IN THE AMERICAN HOME
24 CASE AS A REASON FOR REMOVAL.

25 WE CANNOT TELL IF THIS SPECIFIC ISSUE HAS ARISEN OR

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T-261 P.14/28 P-127

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13

1 WILL ARISE IN CONNECTION WITH OTHER MDL CASES, BUT THE
2 PRESENTATION OF THAT ISSUE BY ITSELF IS NOT IN OUR VIEW
3 DETERMINATIVE OF HOW WE SHOULD DECIDE THE STAY ISSUE.

4 IT APPEARS TO THIS COURT THAT THIS CASE MOST
5 CLOSELY RESEMBLES MEDICAL SOCIETY AND IVY IN THAT BOTH ABBOTT
6 AND AMERICA HOME PRESENT COMPLICATED ISSUES LIKELY TO ARISE
7 BEFORE JUDGE SARIS.

8 THIS CASE IS ALSO LIKE MYERS VERSUS BAYER, 143 FED.
9 SUPP. 2d 1044, AT 1049, WESTERN DISTRICT OF WISCONSIN, 2001,
10 WHERE THE DISTRICT COURT'S CONCLUSION WAS THAT BECAUSE THE
11 JURISDICTIONAL ISSUE APPEARS FACTUALLY OR LEGALLY DIFFICULT
12 AND BOTH DIFFICULT AND SIMILAR OR IDENTICAL TO THOSE CASES
13 TRANSFERRED OR LIKELY TO BE TRANSFERRED THAT IT WOULD GRANT A
14 STAY AND ALLOW THE MULTIDISTRICT COURT TO DETERMINE THE
15 JURISDICTIONAL QUESTION.

16 OUR CASE PRESENTS A VIRTUALLY IDENTICAL SITUATION
17 TO MYERS IN OUR VIEW.

18 IN ABBOTT WHETHER THE CLAIMS AGAINST GSK ARE
19 SEPARATE AND INDEPENDENT UNDER 1441(c) IS INDEED A DIFFICULT
20 ISSUE.

21 LIKEWISE IN AMERICAN HOME WHETHER THE MEDICAL
22 FRAUD CLAIM ARISES UNDER FEDERAL LAW IS ALSO A DIFFICULT
23 ISSUE.

24 BECAUSE THE JURISDICTIONAL ISSUES ARE BOTH
25 COMPLICATED AND LIKELY TO ARISE IN OTHER CASES BEFORE THE MDL

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7-257 P.15/78 P-217

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14

1 PANEL, WE BELIEVE A STAY IS THE MOST APPROPRIATE COURSE OF
2 ACTION FOR THESE CASES.

3 IT DOES APPEAR THAT THE CORE OF THE ISSUES BEFORE
4 THIS COURT HAVE ARISEN OR ARE LIKELY TO ARISE IN CASES
5 TRANSFERRED TO THE MDL COURT.

6 THE CLAIMED MANIPULATION OF THE AVERAGE WHOLESAL
7 PRICE AND THE MEDICAID BEST PRICES ARE FACTUALLY AT THE HEART
8 OF THESE CASES. THE OVERLAP IS SUBSTANTIAL.

9 THIS IS NOT TO SAY THAT THERE MAY NOT BE DISCRETE
10 ISSUES UNIQUE TO THESE CASES WHICH MAY BE UNLIKE OTHER ISSUES
11 BEFORE THE MDL COURT.

12 THESE FACTORS OF CONSISTENCY AND EFFICIENCY WEIGH
13 IN FAVOR OF GRANTING A STAY.

14 IF ANY SUBSTANTIAL NUMBER OF THE ISSUES PRESENTED
15 HERE ARE LIKELY TO ARISE BEFORE JUDGE SARIS, THEN ALLOWING
16 HER TO DETERMINE THEM IN ALL OF THE CASES WILL CERTAINLY
17 PROMOTE CONSIDERATION OF CONSISTENCY. IT WILL ALSO BE MORE
18 EFFICIENT TO HAVE ONE JUDGE CONSIDER ALL OF THE ISSUES.

19 ON THE QUESTION OF JUDICIAL ECONOMY, THIS FACTOR
20 APPEARS TO WEIGH IN FAVOR OF A STAY.

21 IF MDL TRANSFERS THE CASES THEN JUDGE SARIS WILL BE
22 THE ONE TO EXPEND THE TIME AND RESOURCES TO DETERMINE THE
23 JURISDICTIONAL QUESTION.

24 JUDGE SARIS WILL BE CONSIDERING THESE
25 JURISDICTIONAL ISSUES IN OTHER CASES.

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DPW 30-51

Jul-28-02 04:27pm Firm-LAXALT & KAMARA, LLP.

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T-201 P.18/23 P-217

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15

1 IT WOULD DEFEAT THE PURPOSE OF MULTIDISTRICT
2 CONSOLIDATION WERE WE TO TAKE THE TIME SEPARATELY TO CONSIDER
3 THESE QUESTIONS.

4 WE DO RECOGNIZE THE PERSUASIVE ARGUMENT OF THE
5 STATE, ADOPTED BY SOME COURTS, THAT A DETERMINATION OF THE
6 JURISDICTION FIRST ACTUALLY PROMOTE JUDICIAL ECONOMY BECAUSE
7 IT ALLOWS THE CASE TO PROCEED IN THE PROPER FORM.

8 HOWEVER, WE CONCLUDE IN THESE CASES, WHERE THE
9 JURISDICTIONAL ISSUES ARE DIFFICULT AND LIKELY TO ARISS IN
10 THE MDL CASES, A STAY IS PROPER.

11 THE COURT IN MEDICAL SOCIETY SAID, AND I PARAPHRASE
12 THIS A LITTLE BIT, IF THE UNDERLYING JURISDICTIONAL ISSUE
13 INVOLVES A QUESTION OF LAW OR FACT NOT BOUND UP WITH THOSE
14 INVOLVED IN THE MULTIDISTRICT LITIGATION, OR IF IT WERE
15 FAIRLY OBVIOUS, SUCH AS WHETHER THE PARTIES WERE COMPLETELY
16 DIVERSE, THE PREFERENCE WOULD BE TO RULE ON JURISDICTION IN
17 THE FIRST INSTANCE AND NOT TO WAIT FOR THE MDL PANEL'S
18 TRANSFER DECISION.

19 IN THE VIEW OF THE COURT IF THE JURISDICTIONAL
20 ISSUES WERE SLAM DUNK WE WOULD LIKELY NOT DECIDE THE MOTIONS
21 AS WE ARE DOING.

22 IT IS TO A CONSIDERABLE EXTENT THE COMPLEXITY AND
23 DIFFICULTY OF THESE ISSUES AND THE LIKELIHOOD THAT THE SAME
24 OR SIMILAR ISSUES WILL COME BEFORE THE MDL COURT WHICE MAKES
25 OUR DECISION COME OUT AS IT DOES.

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DPW 30-51

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7-215 P.17/25 P-227

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16

1 I MIGHT NOTE THERE THAT OF COURSE THE TRANSFER IS
2 UP TO THE MDL PANEL, AND I'M NOT TRYING TO DECIDE THAT IN ANY
3 WAY, BUT I THINK WHETHER WE STAY OR NOT DEPENDS ON WHAT MAY
4 LIKELY HAPPEN BEFORE THE MDL PANEL, OR WHAT COULD HAPPEN
5 THERE.

6 THEY MAY DECIDE TO SEND THESE CASES BACK TO US AND
7 NOT TRANSFER THEM, AND WE'RE PREPARED TO PROCEED SHOULD THAT
8 OCCUR. THAT'S THEIR DECISION TO MAKE.

9 AND OUR STAY WILL SIMPLY WAIT TO SEE WHAT THEIR
10 DECISION IS.

11 THE ISSUE OF CONVENIENCE OF THE PARTIES AND
12 WITNESSES IS NEXT.

13 THIS FACTOR MIGHT WEIGH TO SOME EXTENT AGAINST A
14 STAY. IT LIKELY WILL BE AN ISSUE THAT THE MDL PANEL WILL
15 CONSIDER IN DETERMINING WHETHER TO TRANSFER THE CASES.

16 CLEARLY IT WOULD BE MORE CONVENIENT FOR THE STATE
17 AND ITS WITNESSES IN NEVADA TO HAVE THE CASES DECIDED IN THIS
18 COURT.

19 THIS CANNOT, HOWEVER, BE SAID NECESSARILY FOR THE
20 DEFENDANTS OR DEFENSE WITNESSES.

21 AT THIS POINT WE CAN'T REALLY TELL WHERE
22 CONVENIENCE LIES.

23 IF THE CASE IS TRANSFERRED TO THE MDL COURT THE
24 STATE WILL HAVE TO PROCEED IN MASSACHUSETTS, YET, AS I WILL
25 COMMENT A LITTLE BIT FURTHER LATER, WITH RAPID AND READY

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07/30/2002 05:26 PM 212 450 3984
JN:2P-02 04:22pm From: LAXAL7 & KAMRA, LITE.

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1-218 P.10/70 P-227

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17

TRAVEL AND COMMUNICATION IN THIS DAY AND AGE THIS DOES NOT
SEEM TO BE A TRULY UNREASONABLE BURDEN.

BASED ON CONSIDERATION OF THESE FACTORS, AND WE
HAVE CONCLUDED THAT A STAY IS THE CORRECT COURSE OF ACTION, A
STAY WILL PROMOTE CONSISTENCY, EFFICIENCY AND JUDICIAL
ECONOMY PENDING WHATEVER IS DECIDED BY THE MDL PANEL.

IT DOES NOT APPEAR TO THE COURT THAT THE STATE WILL
SUFFER ANY REAL PREJUDICE IF JUDGE SARIS RATHER THAN A
FEDERAL JUDGE IN NEVADA DECIDES THESE ISSUES OF JURISDICTION.

WE DON'T ANTICIPATE THE STATE WOULD BE AFFORDED ANY
HOMETOWN ADVANTAGE HERE, AND WE DON'T ANTICIPATE IT WILL BE A
DISADVANTAGE TO BE BEFORE JUDGE SARIS, EVEN THOUGH SHE'S NOT
A JUDGE SITTING WITHIN THE STATE OF NEVADA AND WILL BE
ADDRESSING NEVADA LAW.

AND AS I MENTIONED PREVIOUSLY, WE DON'T FIND IT
PARTICULARLY PERSUASIVE THAT THE STATE OF NEVADA WILL BE
PREJUDICED BY HAVING TO TRAVEL TO BOSTON TO LITIGATE THE CASE
SHOULD THAT TRANSFER OCCUR.

THE SPECIAL COUNSEL FOR THE STATE OF NEVADA
APPARENTLY MAINTAINS OFFICES IN BOSTON AND WILL BE IN BOSTON
ALREADY FOR THE OTHER CASES.

WE ALSO DO NOT BELIEVE THAT ANY DELAY IN THESE
CASES OCCASIONED BY OUR STAY OR BY TRANSFER BY THE MDL WILL
UNDULY PREJUDICE THE STATE.

THE MDL PANEL WILL HEAR THE CASES ACCORDING TO THE

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Jul-25-02 14:22m FIVE-LAXALY & ROMELA, LTD.

ATTORNEYS

1-211 P.18/22 P-327

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1 INFORMATION PROVIDED AT THE HEARINGS LIKELY IN SEPTEMBER, AND
2 WILL DETERMINE WHETHER TO ENTER A TRANSFER ORDER.

3 THE ISSUES HAVE BEEN FULLY BRIEFED AND IF THE CASES
4 ARE TRANSFERRED TO THE MDL COURT IT SHOULDN'T TAKE THE
5 TRANSFERRE COURT TOO MUCH LONGER THAN IT WOULD TAKE THIS
6 COURT TO DECIDE THESE ISSUES.

7 THEREFORE, MS. CLERK, YOU WILL ENTER THE FOLLOWING
8 ORDERS:

9 THE MINUTES HERE SHOULD BE FILED IN BOTH CASES AND
10 SHOULD BEAR BOTH HEADINGS.

11 IN THE ABBOTT CASE, WHICH IS STATE OF NEVADA VERSUS
12 ABBOTT LABORATORIES, ET AL., CV-N-02-0080, IT IS ORDERED THAT
13 THE MOTION FOR RECONSIDERATION, NUMBER 88, IS DENIED.

14 THE CASE CONTINUES TO BE STAYED PENDING A DECISION
15 ON TRANSFER BY THE MDL PANEL.

16 IN THE AMERICAN HOME CASE, WHICH IS STATE OF NEVADA
17 VERSUS AMERICAN HOME PRODUCTS, ET AL., CV-N-02-0202, REFERRED
18 TO AS THE AMERICAN HOME CASE, IT IS HEREBY ORDERED THAT THE
19 MOTION FOR STAY, NUMBER 25, IS GRANTED.

20 THIS CASE IS STAYED PENDING A DECISION ON TRANSFER
21 BY THE MDL PANEL.

22 AGAIN, I THANK COUNSEL FOR YOUR HELP AND WE WILL
23 STAND ADJOURNED.

24 (COURT ADJOURNED, 2:00 P.M.)
25

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T-254 P.20/25 P-227

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19

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND
CORRECT COPY OF THE PROCEEDINGS HELD IN THE
ABOVE-ENTITLED ACTION.

DATE

Cathy M. Worken
CATHY M. WORKEN, CCR, RPR
OFFICIAL COURT REPORTER
400 SOUTH VIRGINIA STREET
RENO, NEVADA 89501
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CATHY M. WORKEN, OFFICIAL REPORTER, (775) 324-6777

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CV-N-02-202-ECR (RAM)

vs.

MINUTES OF COURT

AMERICAN HOME PRODUCTS CORPORATION,
et al.,

Date: July 26, 2002

Defendants.

THE STATE OF NEVADA,

Plaintiff,

CV-N-02-80-ECR (RAM) ✓

vs.

ABBOTT LABORATORIES, INC., et al.,

Defendants.

FILED
2002 JUN 26 PM 1:14

PRESENT: EDWARD C. REED, JR., SENIOR U. S. DISTRICT JUDGE

Deputy Clerk: Colleen Larsen; Reporter: Cathy Worken

Counsel for Plaintiffs: David Wasick; L. Timothy Terry

Counsel for Defendants: Steve Hudspeth; J. Thomas Susich;
Robert Hubbell; Matthew Larrabee; Joseph Young; Ron Castle;
Clark Vellis; Kimberley Harris; Ellen Winograd; Paul Schleifman;
Ron Castle; Vonn Jenkins; Leigh Goddard; Kimberly Dunne;
Bruce Beesley; Fred Harold; David Francis; Eric Gill; Doug Brown;
Chris Cook; David Potter

MINUTES OF CONTINUED HEARING MOTION FOR TEMPORARY STAY (#25),
MOTION TO REMAND (#30) (in CV-N-02-202-ECR), and MOTION FOR REMAND
(#15), MOTION TO STAY (#74), (in CV-N-02-80-ECR):

At 1:30 P. M. Court convenes.

The Court announces its findings and decision for the record.

122

CV-N-02-202-ECR
CV-N-02-80-ECR

IT IS HEREBY ORDERED that the motions to stay (#25 in CV-N-02-202-ECR, and #74, in CV-N-02-80-ECR), are hereby GRANTED, and the cases are stayed pending a decision on transfer by the MDL Panel.

IT IS FURTHER ORDERED that the motions for remand (#19, in CV-N-02-202-ECR, and #74, in CV-N-02-80-ECR), are hereby DENIED.

IT IS FURTHER ORDERED that the motion for reconsideration (#88, in CV-N-02-80-ECR), is hereby DENIED, and the case continues to be stayed pending a decision on transfer by the MDL panel.

At 2:00 P. M. Court adjourns.

DANCE S. WILSON, CLERK

By *[Signature]*
Deputy